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**Commercial Law in the Middle East:
Between Classical Transactions and
Modern Business**

“What matters in all things is usage.”

Sarakhsi, *The Book of Sale* (11th Century)

In the contemporary civil law of obligations, a “Middle Eastern style” could perhaps be identified as a patchwork of European and local traditions with a language and a terminology sometimes derived from classical Islamic law, *fiqh*.¹ This is not the case for commercial law. Whether from an institutional and technical perspective, or whether in the language proper, Middle Eastern commercial law as found in legislation or court cases reads for both practitioners and scholars as a direct transposition of European law. A long-standing tradition of a civilization closely associated with trade seems irrelevant for the present commercial law of the area.

A brief presentation of commercial law decisions across the Arab world is sufficient to show the dominance of western principles in the field, and the direct translation of western terminology and rules for local transactions.² The decisions have been regrouped in categories which will be familiar to the commercial lawyer, and offer ample illustration of the large-scale borrowing from western commercial law.

JUDGMENTS

Syria. Quality of merchant. The Court of Cassation in Syria upheld a decision of the Bar of Lattaquie (North-West Syria) to debar a lawyer who was carrying on commercial activities whilst registered as a law-

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1. This is elaborated in a study of civil law, chapter 4 of my forthcoming *An Introduction to Middle Eastern Law*.

2. The following survey of court decisions is selected from some one hundred commercial law reports from the Arab world, published between 1984 and 1997 in *al-Majalla al-‘arabiyya lil-fiqh wal-qada’* (The Arab journal of jurisprudence and courts, hereinafter MAFQ), in seventeen volumes. Originally published in Morocco, the journal moved to Cairo, where editing, distribution and updating of the journal became poorer. Decisions are cited here first by the country in which the judgment was issued, then by the court appellation, date of the decision, journal issue and date, and page.

yer in contradiction with the Bar Association regulations. It held that the excuse of continuing his father's commercial practice was not relevant and that his inscription in the commercial registry was evidence which he did not rebut, and which, following previous decisions by the same Court of Cassation, established him as merchant before the law.³

Bahrain. Quality of merchant. The quality of merchant, and hence the possibility of declaring bankruptcy, was conferred by the Bahraini Higher Court of Appeal to an Indian resident of Bahrain, who was not entitled as foreigner to enlist in the register of commerce, but who was considered nonetheless a merchant in view of his trading activities. The Court reversed a court of appeal decision which considered that the person in question was a *prête-nom* for other companies, and was as such not entitled to benefit from the regime accorded to merchants. The Higher Court of Appeal stated: "The fact that the appellant [the Indian resident] was not of Bahraini citizenship and thus forbidden from practising commerce in Bahrain, and that subsequently he was not able to register in the commercial register does not prevent him being considered a merchant if the legal elements necessary [to establish the quality of merchant] are present. Article 9 of the Bahraini Code of Commerce considers a merchant any person having the capacity of merchant and taking as a matter of trade a commercial operation in his name and for his own benefit." Even if he operated in some cases for the actual benefit of others, "this does not affect his quality as merchant, which he acquired by effectively engaging in commerce in his name. According to Art.18/2 of the Code of Commerce, the quality of merchant is established for whomever practises trade under a *prête-nom* or hides behind another person, in addition to his establishment [as merchant] on a personal basis."⁴

Kuwait. Quality of merchant. The High Court of Appeal of Kuwait examined in a long decision the problems relating to the acts of commerce and the quality of merchant. The case involved several legal principles established by the court, some of which *obiter*. The facts of the case are complicated, and the decision not very clear. It brings together three commercial appeals over a dispute between heirs to a large piece of land and contenders to at least part of the land because of an operation of sale to merchants with an apparent view to a quick profit after division of the estate and resale. The court rejected all three appeals, and confirmed the original owners in their ownership, also confirming compensation to the purchaser at the time the debt is

3. Al-Jumhuriyya al-'arabiyya al-suriyya (Syrian Arab Republic), Mahkamat al-naqd (court of cassation), 6 june 1985, MAFQ 12, 1992, 205.

4. Dawlat al-Bahrain (State of Bahrain), Mahkamat al-isti'naf al-'ulya (higher appeals court), 3 january 1987, MAFQ 11, 1992, 334, at 336.

owed, which the court equated with the time the original suit was brought up. With regard to the specific commercial dimension of the dispute, the Kuwaiti Court of Cassation also confirmed the lower court in its objective appreciation of the quality of merchant on the basis of the mercantile nature of the deal over the land: "Appreciation of the quality of merchant can be established by all types of legal evidence. . . The establishment of the mercantile nature of a transaction is of the exclusive competence of the court of fact and there is no control over it."⁵

Jordan. Liability. Port Authority. A finely argued decision of the Jordanian Court of Cassation held that the liability of a port authority for the loss of merchandise was part of its duties as carrier of this merchandise within the precinct of the port and could not be removed by an argument of *force majeure* derived from its loss because of theft. An Iraqi cargo had unloaded six containers into the port of 'Aqaba. Two containers went missing, and a criminal inquiry was in progress. The Port Authority was asked to compensate the cargo liner in full by the first instance court and the Court of Appeal. The Port Authority appealed before the Court of Cassation on the ground that the transport of the goods in the containers into the silos of the Port was not part of the operation of transport. The Court demurred, on the basis of the unity of the operation. The appellant also argued the necessity to wait for the result of the enquiry as penal law ties civil and commercial law. The Court rejected the argument as the inquest's objective was to look for possible thieves, and considered that its result was irrelevant to the liability of the Port Authority. Indeed, either the thieves were employees of the port and the Port Authority was responsible for them following Art. 288 of the Civil Code, or they were foreign to both parties, and liability for the safety of the merchandise was entirely incumbent on the Port Authority.⁶

Bahrain. Liability. Duty of care. This was a case of goods transported in a container which had been seriously damaged. The Court of Cassation upheld the decisions of the lower courts (in first instance, *al-mahkama al-sughra*, because of the small amount involved, ca 600 dinars, then the upper court, *al-mahkama al-kubra*). Lower courts had awarded the money to the plaintiff – an insurance company, which had paid the insured merchant for receiving the damaged goods, and substituted itself for his claim against the defendant – a maritime carrier. The courts at all levels agreed that the Bahraini Maritime code does not absolve the carrier from his duty to look after

5. Dawlat al-Kuwait (State of Kuwait), Mahkamat al-isti'naf al-'ulya, da'irat al-tamyiz (higher appeals court, section of cassation), 26 march 1986, MAFQ 16, 1994, 314 at 324.

6. Al-Mamlaka al-urduniyya al-hashimiyya (the Hashemite Kingdom of Jordan), Mahkamat al-tamyiz (court of cassation), 19 january 1987, MAFQ 11, 1992, 327.

the merchandise carried, notwithstanding any clause to the contrary in the contract of transportation. The Court of Cassation noted that "the carton boxes had been seen inside the container in the normal and usual way in the commercial field," and that the argument of the carrier that the merchandise had delivered the container in good shape did not suffice to curtail his liability.⁷

Tunisia. Liability. Damaged goods. A decision of the Tunisian Court of Cassation confirmed the responsibility of the carrier toward the buyer in case of damage to merchandise carried by sea on the basis of Art. 146 of the Code of Maritime Commerce, which stipulates that "any damage to the merchandise is supposed to have taken place between possession and delivery so long as the carrier does not provide evidence otherwise." The carrier, said the Court, did not rebut the presumption, and the stevedore to whom the carrier was imputing responsibility is not liable "so long as the maritime carrier did not prove that the merchandise was in good condition when delivered to the stevedore."⁸

Syria. Liability. Air carrier. In a long decision, the Court of Cassation confirmed the judgment of the Court of Appeal establishing the responsibility of a German air carrier for refusing to fulfil its obligations of transporting the petitioner, a sick man who was coming back from New York to Damascus. The passenger had boarded the plane with a medic and a special bed, and was summoned by the captain to unboard. The man died a few days later. Several legal aspects were addressed by the court which fall outside the commercial field proper: in the law of obligations, the remoteness of damage, in the law of conflict, the competence of the Syrian court on the basis of French precedents, and in the law of evidence and procedure, expert reports and the review of the evidence produced by the lower court. In the commercial field, the responsibility of the air carrier was established under the 1929 Warsaw convention. The airline, the court concluded, did not fulfill its obligations under the transport contract notwithstanding internal directives of the company allowing the captain of the plane to refuse boarding to a seriously ill passenger.⁹

Kuwait. Liability. Air carrier. The Warsaw convention was also the main reference in a decision of the Kuwaiti court of cassation which established the responsibility of an air carrier for goods perishing in the custody of customs at the airport. The court confirmed that liability started from receipt and ended only upon delivery. This did not

7. Dawlat al-Bahrain (State of Bahrain), Mahkamat al-tamyiz (court of cassation), 10 june 1990, MAFQ 12, 1992, 202 at 203, 204.

8. Al-Jumhuriyya al-tunisiyya (Tunisian Republic), mahkamat al-ta'qib (court of cassation), 3 may 1982, MAFQ 11, 1992, 337 at 339.

9. Al-Jumhuriyya al-'arabiyya al-suriyya (Syrian Arab Republic), Mahkamat al-naqd (court of cassation), 3 march 1987, MAFQ 11, 1992, 340-46.

prevent the judges from rejecting contributory negligence and from allowing liability to extend jointly and severally to the customs' office, so long as evidence did not exonerate that office from its responsibility. Solidarity between co-debtors, here the customs office and the air carrier, was total, and the victim could sue either for the totality of the debt.¹⁰

United Arab Emirates. Commercial instruments. Documentary letter of credit. In a procedurally complex decision,¹¹ the Supreme Federal Court of the United Arab Emirates established the joint responsibility for a documentary letter of credit opened at a bank *in solidum*, even though one of the parties may have established a different relationship with the other debtor in the contract of partnership. "The bank was not party to the contract between the partners. Its knowledge of the contents and conditions of the partnership contract or the contract leading to its dissolution does not affect the obligation *in solidum* of the appellant with the other appellee since the opening of the documentary credit took place after the contract establishing the partnership." There was no obligation on the part of the bank "so long as the bank did not accept absolving the joint debtor from the obligation contracted *in solidum* with his partner. The silence of the bank towards these letters is in reality a rejection of these arguments, especially since the appellant did not ask the bank for a remittance of the debt and the full discharging of the liability for the documentary credit to remain with [his partner]."¹²

Jordan. Commercial instruments. Endorsement. In a brief decision, the Jordanian Court of Cassation rejected the appeal of an endorser who had issued an endorsement carrying on the bill the mention "value of guarantee," and held that the Code of Commerce did not make any difference between the original debtor and the guarantor in this respect: This was a guarantee endorsement, said the Court, "which like the usual endorsement, establishes transfer of prop-

10. Dawlat al-Kuwait (State of Kuwait), Mahkamat al-isti'naf al-'ulya, da'irat al-tamyiz (higher appeals court, section of cassation), 13 february 1985, MAFQ 11, 1992, 349-53. For another decision in this field, translated in English in full, and mainly based on the Warsaw convention, see *Dr. Najeed Al-Nuaimi v. Gulf Air*, decided by the court of Appeal of Doha, 9 june 1993, in E. Cotran & C. Mallat (eds.), *Yearbook of Islamic and Middle Eastern Law* i, 558-64 (1994). (In a case of overbooked flights, the court awarded "full compensation," set at 150,000 riyals (1 USD = 3.6 Qatari riyals in 1995), by air carrier to first class passenger and his family, who were unable to board the plane, for "loss of gain or the result of loss, and moral and material damage," at 564).

11. Dawlat al-Imarat al-'arabiyya al-muttahida (United Arab Emirates), Al-mahkama al-ittihadiyya al-'ulya (federal supreme court), 9 december 1987, MAFQ 11, 1992, at 331.

12. *Id.*, at 333.

erty. . . The person to whom endorsement was made can ask for the full value of the bill when due.”¹³

*United Arab Emirates. Commercial instruments. Cheque.*¹⁴ The National Bank of Abu Dhabi had brought action against a client for unpaid debts, and had received a judgment in its favour in first instance and on appeal. The defendant brought in the meantime another action against the bank for withholding twenty-two cheques made to his order, the value of which (some 2,623,0000 dirhams; 1 USD 1995 = 3.7 UAE dirhams) amounted to a sum far beyond the compensation granted to him in the previous judgment. The bank argued that final decision had already been made by the other court, but the second court carried on and delivered judgment against the client. On appeal, the Court of Appeal of Abu Dhabi held that the cheques were considered as a guarantee up to the value of the client's debt. It also appointed an expert to see whether the withholding by the bank of the cheque was acceptable “under the customs of banking.”¹⁵ The expert concluded to the irregularity of the bank's practice in the case, as it should have carried on cashing the cheques, even if it knew that there was no adequate provision, but the Court of Appeal decided nonetheless for the bank on the ground that “the bank has two qualities: first, it is an agent for the purposes of cashing the cheques deposited with it, and, secondly, it is a pledged creditor benefiting from the cheque as security.”¹⁶ The bank was therefore not liable for refusing to cash the cheque as it knew, notwithstanding the report of the expert, that there was no provision for the cheques deposited.

The defendant appealed in cassation before the Supreme Federal Court, which brought together the various actions and procedural incidents. At issue, the court held, were five pleas from the appellant. It proceeded by rejecting four of them, while reversing the decision on one count.

The first argument was the wrong appreciation by the lower courts of the nature of the cheques and the expert's report. The Supreme Court saw that the practice of the bank was not irregular, that it was natural that the bank would credit the client's account upon receipt of the cheques, and that it would proceed back and debit them if it turns out there were insufficient funds. The cheque was to be considered therefore as *prima facie* security.

The legal qualification of the cheque provided also a second and third arguments for the appellant, who claimed that no security could

13. Al-Mamlaka al-urduniyya al-hashimiyya (the Hashemite Kingdom of Jordan), Mahkamah al-tamyiz (court of cassation), 3 July 1991, MAFQ 14, 1993, 253, at 254.

14. Dawlat al-imarat al-'arabiyya al-muttahida (United Arab Emirates), al-mahkama al-ittihadiyya al-'ulya (federal supreme court), MAFQ 14, 1993, 256-62.

15. Id., at 258, “*hasb al-'urf al-masrif*.”

16. At 259.

be made to affect a cheque under Art. 1449 of the Law on Civil Transactions, which requires that the object of security must be capable of being sold in auction. Again, the court rejected the argument, holding that nothing prevents cheques from being considered as possessory pledges with a bank. The appellant claimed further that there were contradictions between the qualification of the decisions of the various appeal courts. The Supreme Court saw otherwise, explaining that the bank was operating in various capacities, but that they were all premised on the concept of cheque as security for the client's debt.

A fourth plea of the appellant in cassation to the effect of a contradiction between the decisions of the Court of appeal as to the qualification of the cheque deposited with the bank was also rejected. "It is not necessary for the pledgee bank," the Federal Supreme Court held, "to return some of the cheques and to hold on only to the amount of the debt, since the money deposited as security must be considered one complete unit to guarantee the debt and is often superior to that debt."¹⁷

However, the court held for the client on one count. It held the bank liable for not carrying the procedure for bad cheques to its judicial end, notably for two out of the twenty-two cheques deposited, and considered that the two cheques, with a value of 150,000 dirhams (ca \$40,000), "were not a trivial sum" as argued by the bank.¹⁸ The responsibility of the bank was therefore established to that limited extent and the decision remanded down to the Court of Appeal for revision.

Iraq. Commercial instruments. Cheque endorsement. In a short decision, the Court of Cassation reversed a lower decision which had annulled a cheque because of the absence of mention in it of the place of its issuing. It based its decision on Art. 185 of the new Iraqi Code of Commerce of 1984, which did not stipulate the place of issuing as one of the conditions of the cheque's validity.¹⁹

Iraq. Commercial instruments. Notarisation of bill. Prescription. Also in a short decision, taken by majority, the Iraqi Court of Cassation held that a commercial bill retained its commercial nature even after notarisation, and was therefore subject to the period of limitation under the Commercial Code.²⁰

17. At 262. Argument based on comparative laws, "*hasb al-qawanin al-muqarana*."

18. *Id.*

19. *Jumhuriyyat al-'iraq* (Iraqi Republic), *Mahkamat al-tamyiz* (court of cassation), 28 january 1988, MAFQ 11, 1992, 347-48.

20. *Jumhuriyyat al-'iraq* (Iraqi Republic), *Mahkamat al-tamyiz* (court of cassation), 31 july 1990, MAFQ 14, 1993, 268. This must be one of the last decisions of the Iraqi Court of cassation before the invasion of Kuwait.

*United Arab Emirates. Commercial instruments. Debtors' obligation in solidum.*²¹ The Federal Supreme Court of Cassation sitting in Abu Dhabi, confirmed the decision of the Federal Court of Appeal sitting in the Emirate of Sharjah and rejected two pleas by the appellants: the first was a plea to disregard joint liability for a commercial bill. The second plea demanded the suppression of interest on late payment of the debt. On the first plea, the Supreme Court held that even if the law did not expressly acknowledge solidarity for a bill, the practice of commerce considered such papers to be commercial, and all obligors on the paper were jointly liable for discharging them. The Court cited the draft Code of Commercial Transactions (which was adopted two years after the decision was handed down, in late 1993²²) as further argument, even though a bill as such was not included among the commercial papers cited in the Code for joint liability. On the issue of interest, the Court explained that late payment, under the principle "delay by the rich is harm,"²³ requires compensation to the party injured, and that interest on late payment of the debt, which had been imposed by the lower courts as compensation, was warranted and legal.

Morocco. Commercial debt. Prescription. Reversing a decision by the Court of Appeal of Fes, the Supreme Court of Morocco held that the specific time limitation governing a commercial debt is to be found in the Commercial Code, Article 189 of which "holds all cases resulting from a commercial invoice against the accepting drawee, to be subject to a period of three-year time limitation," but that partial payment brings an end to the issue of limitation under Art. 152 of the Code. The dispositions of the Civil Code were considered irrelevant.²⁴

Algeria. Preemption in commerce. In a poorly worded decision, the Supreme Court of Algeria reversed a Court of Appeal judgment which had allowed the exercise of preemption over the transfer of commercial property – *fonds de commerce*. The contract between the new owner of the *fonds de commerce* and the original merchant was considered void by the Court of Appeal because the transfer had been made in the absence of the owner of the building where the commerce was located, who was allegedly denied his right to exercise preemp-

21. Dawlat al-imat al-'arabiyya al-muttahida (United Arab Emirates), Al-mahkama al-ittihadiyya al-'ulya (federal supreme court), 23 december 1992, MAFQ 15, 1994, 299.

22. Federal law 18 of 1993, came into force 20 december 1993. For a comprehensive overview, see Price, "United Arab Emirates," *Yearbook of Islamic and Middle Eastern Law* 307-29 (1994).

23. "Matl al-ghaniyy zulm" (*hadith*), in decision cited supra n. 21, at 302.

24. Al-Mamlaka al-maghribiyya (Kingdom of Morocco), al-majlis al-a'la (supreme court), 7 december 1988, MAFQ 11, 1992, 359-60 at 360.

tion. The Supreme Court reversed by affirming the lack of relevance of the right of preemption in commercial sales.²⁵

Libya. Bankruptcy. Directors' responsibility. In a confusing decision over a case which seems to have dragged on since before 1969, the Supreme Court rejected the applicability of the personal liability of directors, as mentioned in Art. 555 of the Commercial code, and the necessity to restrict liability to the assets of a bankrupt company. The facts seem to support a clear operation of fraud, whereby one or more directors of an import company received huge sums for material to be imported to Libya, which they put in their private bank accounts. Eventually, the company went bankrupt, but the plaintiffs obdurately requested the examination of the personal responsibility of the directors beyond their ownership of shares in the company. While the decision of the Court did not appear too convincing in law in view of the evidence of fraud, it might be explained by "a letter of the defendant to the president of the revolutionary council," which clearly acknowledged the fraud, but which might have acted to deter the Supreme Court judges from punishing the rogue director who turned out to have strong connections in high places. Articles 554 and 555 of the Commercial Code, which hold directors responsible on their own fortune for fraud to the company, were set aside by the Court on the basis of the bankruptcy process which prevented debtors from pursuing directors outside the strict bankruptcy procedure.²⁶

Bahrain. Bankruptcy. Date of appreciation. In a brief decision, the Court of Cassation in Bahrain refused to be drawn on the subject of assessing the effective date of bankruptcy of a merchant, leaving such assessment to the lower courts as an issue of fact.²⁷

Kuwait. Bankruptcy. Liquidation of limited liability company. A plethora of suits and counter-suits had resulted from a dispute between a Kuwaiti 51% shareholder in a limited liability company and his Syrian partner for 49% of the shares, and the High Court of Appeal joined all claims in its judgment. The Court held that in case of disagreement which prevents the continuation of a limited liability company, and in the absence of regulations under the company articles of association, the rules under the Commercial Companies Law of 1960 require the appointment of a liquidator, who is in charge of

25. Al-Jumhuriyya al-jaza'iryya al-dimuqratiyya al-sha'biyya (Democratic Popular Republic of Algeria), al-majlis al-a'la (supreme court), 21 january 1984, MAFQ 16, 1994, 311.

26. Al-Jamahariyya al-'arabiyya al-libyya al-sha'biyya al-ishtirakiyya al-'uzma (the Great Popular Socialist Arab Libyan Jamahiriyya), al-majlis al-a'la (supreme court), 29 october 1984, MAFQ 11, 1992, 354-58. Letter to Mu'ammar al-Qadhdhafi mentioned at 356 and 360.

27. Dawlat al-Bahrain (State of Bahrain), Mahkamat al-tamyiz [?] (court of cassation), 28 June 1992, MAFQ 15, 1994, 303. Note the French terms of the Code of Bankruptcy and of Concordat Préventif, "*qanun al-iflas wal-sulh al-wiqai'i*".

assessing the dissolved company and of distributing the proceeds of the liquidation accordingly. The Court reversed a ruling of the lower court which had allowed the distribution of the assets on the basis of a balance dated at the start of litigation, and requested the newly appointed liquidator to proceed with the allocation of the remaining credit to the partners at the date of liquidation.²⁸

There is little in these examples which a commercial lawyer trained in the west will not be comfortable with. Occasionally, as in the 1992 decision of the Federal Supreme Court of the United Arab Emirates on the joint liability of debtors whose signature figures on a commercial instrument, the issue of *riba*, 'interest', re-emerges. With the possible exception of Saudi Arabia, and recently of Iran, interest is invariably upheld.²⁹

Variations will naturally occur in matters of detail, but the language is one which reads as a straight translation from a western commercial code. Plagiarism — or borrowing — runs the gamut of the whole field of commercial law, from the objective quality of merchant to the mechanisms of bankruptcy, and typically includes technical rules on commercial papers, transport liability, and company law. The local commercial statutes, and the courts which apply them, adopt terminology and categories which are taken straight from western practice. The executive, acting as legislator, will also ratify and incorporate western-made international conventions in which Middle Eastern input is negligible, if not nil. The style of commercial law in the region is decisively western.

THE CLASSICAL TRADITION

The direct bearing of foreign models may have not been necessary to that comprehensive extent. It is possible to detect in the misprepared and impoverished genesis of Middle Eastern commercial law, the prodromes of unease for a forgotten tradition.

From time to time, the tradition tries to take revenge for this disregard, sometimes in a deliberately provocative manner. This is most apparent in the recent manifestation of two phenomena which, this article will argue, operate as *fuite-en-avant*: arbitration, and the so-called field of "Islamic banking."

Before we examine the purported unease, a flashback is necessary to see what commercial law might have meant in Middle Eastern history, and to wonder about the possible reasons for the chasm between the textual tradition and present legislation. The gap is perplexing because of the importance of commerce in the region, both as

28. Dawlat al-Kuwait (State of Kuwait), Mahkamat al-isti'naf al-'ulya (higher appeals court), 10 january 1986, MAFQ 14, 1993, 270.

29. See further section on Islamic banking infra.

reality and as mental social construct, since at least the advent of Islam in the sixth century, and the persistence of its importance through the classical age.

Already a hundred years ago an orientalist scholar had noted how the domination of commercial terms-of-the-art operates in the Qur'an, in tune with what one would expect in a Meccan society whose Prophet was a trader by profession.³⁰

Although an understudied field, what we know of classical commercial law requires, over the extensive span covered by Islamic law, to distil certain characteristics which offer some perspective on the present-day relationship between Islam and business.³¹

The list of specifications in the Qur'an covering commerce is long: it includes contracts, the necessity of their certainty, the central importance of ethics, the strict requirements of honoring one's obligations, of putting them in writing, the importance of trade, in addition to the famous sentence in the second chapter explaining how trade has been allowed by God, but *riba* (interest, usury) forbidden.³²

Except for the *riba* question – and even then there is little which is qualitatively different from other Biblical religions –³³ the general ethical system cannot be labelled as exclusively Islamic. Most Qur'anic features are shared by world religions with regard to business and the necessity of ethics in the transactional relations of

30. C.C. Torrey, *The Commercial-Theological Terms in the Koran* (1892). Also in that early vein, Richard Grasshof, *Wechselrecht der Araber* (1899), who includes a refreshing note on the varieties of Islamic law, at 11-12: "Daher gibt es in Islam so viele originale Rechtssysteme als es originale Juristen gibt; und dies sind nicht nur die Gründer der vier orthodoxen Schulen neben der Shi'a."

31. There is a large literature on the subject of classical trade in the Mediterranean (that is between Europe and the Orient), partly reviewed by Jean-Claude Garcin, "Le JESHO et la recherche sur l'histoire économique et sociale des pays musulmans," *Journal of the Economic History of the Orient* 36 139-53 (1993). The most remarkable archival work was achieved by Samuel Goitein and his disciples. One should also examine works which are less Mediterranean-centered such as, in Braudelian fashion, the books of K.N. Chaudhury on *Trade Civilisation in the Indian Ocean: An Economic History From the Rise of Islam to 1750* (1985); *Asia Before Europe* (1993). In a different, but no less encyclopaedic mode, see the trade tradition in South East Asia as portrayed in Denys Lombard, *Le carrefour javanais: essai d'histoire globale*, 3 vols., (1990), especially volume 2. The identification in the common law of Islam of trade patterns, which the French historian Fernand Braudel calls long wave or long structure (*longue durée*), might help understand how fourteen centuries have come to bear on the world of business in Islam. For this purpose, the law of trade is a useful indicator.

32. "Honour your contracts," v:1, xvii:34; "put your debts in writing," ii:282, "woe to the fraudsters," lxxxi:1; "God has allowed commerce and prohibited *riba*," ii:275.

33. There is understandably a large literature on the subject of "the prohibited *riba*." See for an extensive discussion in 20th century Egypt, my "The debate on *riba* and interest in twentieth century jurisprudence," in C. Mallat (ed.), *Islamic Law and Finance* 69-88 (1988); "Tantawi on banking operations in Egypt," in M. Masud, B. Messick & D. Powers (eds.), *Islamic Legal Interpretation: Muftis and Their Fatwas* 286-96 (1996), and the references cited therein. John Noonan has written the standard treatise on the subject in Canon law, *The Scholastic Analysis of Usury* (1957).

human beings. These are important for the survival of the business sanctity of contracts and of morality in any society. In the face of such trite fact, and to the extent that it is possible to discover a different slant in the documents borne by Islamic law, is there a *specificity* of business in Islam?

In a long wave perspective, specifically 'Islamic' intellectual and practical products can perhaps be summarized in a number of propositions adduced from classical *fiqh* texts.

The central role of trade. The first element is the centrality of trade, the universal respect it carries in Muslim civilization, and the importance of commerce as the nerve of the city and of regional or international exchange. The free movement of goods is a key element in the intellectual structure of early Islam through to the present period. The fact that the Prophet Muhammed started his career as a caravan merchant is unique to the Islamic Prophecy; the tradition relating to the other great monotheistic epigones in the figures of Abraham and Jesus does not acknowledge the centrality of trade and commerce in any similar way. In the case of Jesus, the episode of the Temple merchants even points in the opposite direction, with the mercantile pursuit of wealth depicted in a derogatory manner.³⁴ In contrast, the original textual tradition of Islam and of Islamic law acknowledges the importance of commerce, including the security of long-distance trade and market sanctity, both on the ethical and the practical level. Whatever the reality of emporia in the early Islamic Hijaz,³⁵ the tradition of an Islamic Prophet-merchant is firmly received and developed across the centuries. Neither classical Christianity or Judaism seem to have extolled "the virtues of commerce" in such a detailed nor enthusiastic argument for 'the commercial professions' as did Dimashqi (11th century CE) in his *Mahasin al-tijara*.³⁶ Nor is the display of legal agency so remarkable as in the classical jurists'

34. Matthew, xxi:12; Marc xi:15; Luke xix:45; John ii, 13. See generally J.D.M. Derrett, *Law in the New Testament* xxiii, 278 (1970).

35. In *Meccan Trade and the Rise of Islam* (1987), Patricia Crone has cast serious doubts on the centrality of trade in South Western Arabia as portrayed in such classical theses as Henri Lammens, *La cité de Taïf à la veille de l'Hégire* (1922); *La Mecque à la veille de l'Hégire* (1924). A typical Lammens portrayal is summed up in his *L'Islam* 21-22 (1944): "[Looking at Mecca at the time of the Prophet], on croit surprendre comme le bourdonnement d'une ruche humaine, se trouver aux abords de nos Bourses modernes. . . La Mecque devient le paradis des caravaniers, des courtiers, des entremetteurs, des banquiers avec leurs prêts d'argent, placés à des taux usuraires ou paraissant tels à qui refuse de tenir compte des risques énormes du capital à cette époque et dans ce milieu de nomades insaisissables. . . Au dire de Strabon, tous les Arabes sont courtiers ou commerçants. . . A la Mecque, 'on ne professait d'estime que pour les marchands', *man lam yakun tajiran falaysa 'indahum bi-shay'* [literally, those who are not merchants are nothing to the Meccans]."

36. *Mahasin al-tijara*, (The virtues of commerce) published Cairo 1318 AH, and discussed at length in S.D. Goitein, *A Mediterranean Society*, 5 vols., 1967-1988, in volume 1; and in Claude Cahen, "A propos et autour d'un arabisches Handbuch der Handelswissenschaft," *Oriens* 160-71 (1962).

treatment of the contract of sale, which is, since early Islam, the measuring rod for all its "contractual sisters."³⁷

Sale as paragon transaction. The contract of sale is the paragon of contracts in Islamic law, along the lines of which are constructed any other contracts. Although there is neither a theory of contract in classical Islamic law, nor any general theory of obligations such as in late Roman or French law, one does find an elaborate structure of Islamic law texts around the book of sales. Here is a typical formulation:

The basis of sale is the exchange of a desired commodity against another desired commodity.

This can be done by word or by deed.

As for word, this is known as offer and acceptance in the tradition of the jurists.

Treatment of offer and acceptance is twofold: first the mode of the offer and acceptance and second the nature of the offer and acceptance.

First the mode: offer and acceptance, we say – and God help us to success – could be made in the present or in the past mode.

If in the past mode, then the seller would say 'I have sold' and the buyer 'I have bought'. The basis is then complete since this mode, albeit formulated in the past, constitutes an immediate offer in the language of lexicologists and jurists. Custom is decisive in this regard.³⁸

This is how Kasani opens up the book of sale in his encyclopaedic legal treatise in the 12th century. Strict legal logic then develops with the formulation of sale in the past tense, and the reason why use of the past tense is considered better: each of these formulas "gives the meaning of sale, which is exchange: importance is in the meaning not in the expression."³⁹

This only makes sense in comparison with the alternative modes: formulation in the present tense. If the formulation of offer and acceptance is in the present tense, the contract is also concluded, but this is because the intention to sell and buy is ready and clear for both parties, and Kasani is willing to consider both intention and general use, which concur. In contrast, he continues, an offer made in the form of a question, or in the imperative mode, is not acceptable in law, even though it may have been valid for the earlier jurist Shafi'i

37. Kasani (d.1191), *Bada'e' al-Sana'e'*, Beirut, n.d., v, 167: "*wal-bay' wa akhawatuhi tubtiluha al-shurut al-fasida*" (contract and its sisters are annulled by void conditions).

38. Kasani, v, 133: ". . . fi 'urf ahl al-lugha wal-shar'. . . al-'urf qadin 'alal-wad'."

39. "*Al-'ibra lil-ma'na la lil-sura.*" Id.

(d.820), who had used the contract of marriage as analogy. Why is that?

For Kasani, the rejection of the analogy with marriage is based on the specificity of the marriage contract, "in which bargaining is unusual." Kasani explains that one could follow in the contract of sale the possibility of accepting the conclusion of marriage if the formula is, for the guardian of a woman, in the imperative (future) form, "as when someone tells the other, 'marry my daughter' and the addressee says 'I have', or if one says 'marry your daughter to me' and the addressee says 'I have'."⁴⁰ For Shafi'i, this should be equally valid for a formula in the imperative in the case of a sale, on the basis of analogy.

For Kasani, the reason why "analogy has been abandoned" in this instance, despite the fact that there is no text to support such departure, is because of the process of bargaining which is inherent to sale, whereas it would cause embarrassment in the case of marriage. In the case of a marriage, therefore, acceptance could be issued in the future imperative form, or in the form of an acquiescence to a question because it would not be right to involve bargaining in the process. The fact that the element of bargaining is inherent in the case of sale offers enough of a contrast to sharply distinguish the two. It is therefore possible to consider offer and acceptance in the form of a question and answer, or in the imperative, for the conclusion of marriage. Such "imprecision" is not allowed for the conclusion of a contract in the case of sale, because it constrains bargaining which is of the essence in commerce.⁴¹

While it is not our purpose to present the details of the Islamic law of sale, three premises can be said to underlie the system as it pertains to trade in classical law: certainty, flexibility and pragmatism.

As for certainty, it is remarkable that, in one single page, Kasani repeats five times the need to avoid, in the terms of the contract, "any oversight which may be conducive to litigation."⁴² Through certainty is consecrated the fulfilment of the exact intention of the parties as also manifested in the meeting of minds in the bargaining session.

Flexibility is offered through an elaborate system of options, perhaps one of the most complex areas of Islamic law, which is dominant and crucial for the study of the sale contract. The contract of sale is not binding unless "it is clear from four options: the option of specification, the option of condition, the option against defects, and the op-

40. *Id.*, at 133 bottom.

41. *Id.*, at 134 top.

42. "*Jahala mufdiya ila niza*," 209. See also the formula elsewhere in the book, e.g., at 198, 207.

tion of vision.”⁴³ These are conventional or presumed clauses in the contract, and allow for several variations within the contract within an overall regulatory framework for their ‘exercise’.⁴⁴

Pragmatism is the third element. We have seen its importance in the very definition of sale. Pragmatism is a key component of the Islamic law merchant through the importance accorded by the jurists to custom as a central source and element in the system. Examples can be multiplied of striking formulas in which Kasani, like other jurists, are prepared to abandon strict rules in favor of the merchants’ customs.

The importance of custom. A characteristic of the long wave patterns of the Islamic law merchant is indeed custom, which plays a vital and controversial role, in that it is not generally associated with Islamic law, despite its importance for understanding the long-term structure of Islamic business. According to the received basic structure of “the sources of Islamic law,” custom does not figure among the usual sources.⁴⁵ But in the law of sale, custom is “decisive,” as in the words of Kasani. Nor is that an isolated rendering. A jurist like Sarakhsi (d. ca 1095) is no less emphatic:

If a vendor buys a cloth, he is authorised to include in the price what was spent for sewing and transport, but he must say, ‘This is what it cost me’ and not ‘I have bought it at such a price’, because the latter formula would be wrong. The *murabaha* (profit) in that partnership contract, the ‘*urf*, the custom of the merchants is taken into account. What customary practice authorises in addition to the buying price can be added on by the merchant. What practice excludes must be excluded.⁴⁶

Custom is decisive in the law merchant, and one will find in Sarakhsi’s *Mabsut* and many other texts that deal with the book of sales and with other contracts in Islamic law a systematic reference to trade customs, including ‘*adat al-tujjar* – the use of merchants and their practice –; *ta’amul al-nas*, i.e., the way people deal amongst themselves; *ta’aruf bayn al-nas*, the interaction between people; as well as the notion of *wajh al-tijara* or the direction of commerce. These are recurring concepts which provide an overall framework ac-

43. “*An yakun al-‘aqd khaliyan ‘an khiyarat arba’at, khiyar al-ta’yin, wa khiyar al-shart, wa khiyar al-‘ayb wa khiyar al-ru’ya, fala yalzam ma’a ahadin min hadhih al-khiyarat,*” 228.

44. For a discussion in English of the options’ regime, Noel Coulson, *Commercial Law in the Gulf States* 56-74 (1984); S.E. Rayner, *The Theory of Contracts in Islamic Law* 305-351 (1991) and her references.

45. Further discussion in chapter 1, “Historical and comparative frameworks,” in *An Introduction to Middle Eastern Law*, cited supra n. 1.

46. Sarakhsi, *al-Mabsut*, xiii, 80, discussed in A. Udovitch, “Les échanges de marché dans l’Islam médiéval: Théorie du droit et savoir local,” *Studia Islamica*, lxxv, (1987), 5-30, at 17.

cording to which Islamic law subjects the legality of commercial transactions in the city to the practice of merchants and people.⁴⁷

Sometimes a contradiction arises over the clash between the necessity of certainty in the contract, and usage. In one instance of such a clash, Sarakhsi explicitly says that the law ultimately chooses what will facilitate people's lives.⁴⁸ In another example which shows how the law merchant relies on custom in Islam, the departing point is that if one is selling something that does not yet exist, it is obvious that the element of certainty in the contract may be undermined. In a long text, Sarakhsi explains that this may be the theory. In practice, when you ask someone to sew a cloth or to build a house for you, it is not possible to know exactly how it will turn out. Would that render the contract void? The answer in strict, classical Islamic law, should be yes. In fact, the opposite practice was and remains widely used.⁴⁹ To repeat a formula Sarakhsi ascribes to one of two masters of the Hanafi school, Abu Yusuf (d.798): "What matters in all things is the 'urf".⁵⁰

Kasani has equally striking formulas, one of which will be included, several centuries later, as one of the Ottoman Majalla's ninety-nine opening principles: in matters of sale, "what is known by custom is equal to what is agreed upon as a clause."⁵¹

"*This is what it cost me.*" With certainty, flexibility and pragmatism, a fourth element should perhaps be underlined in the Islamic law merchant. This appears in a text of Sarakhsi mentioned earlier as "this is what it cost me:"⁵² in other words, the 'extras' that come into the price of a commodity are important as they imply an opening up of the law merchant to a number of elements that are not strictly legal but are vital in the practice of trade.

Here we have a few examples in studies on sixteenth and seventeenth century Iraqi trade in Basra. Merchants had to allow for charges in what may be termed as protection costs, that is, "the price merchants had to pay in taxes, tolls, fees, and bribes, to ensure the flow of their commodities."⁵³ This was part and parcel of the cost of

47. Udovitch, "Echanges de marché," id., at 21.

48. Sarakhsi, *al-Mabsut*, xiii, 115. ("*taysiran 'alal-nas*")

49. Sarakhsi, *al-Mabsut*, xiii, 138.

50. Sarakhsi, *al-Mabsut*, xiii, 142.

51. "*Al-ma'ruf bil-'urf kal-mashrut bil-shart*," Kasani, v, 167; the exact wording was adopted as Art. 43 of the Ottoman Majalla ("*Al-ma'ruf 'urfan kal-mashrut shartan*"), see also Art. 40: "*Al-haqiqa tutrak bi dalalat al-'ada*, truth is left for custom." Also on custom as '*ada* (usage), Majalla Art. 36: "*Al-'ada muhkama*, usage is decisive"; Art. 41: "*Innama tu'tad al-'ada idha ittaraadat wa ghalabat*, usage is followed if persistent."

52. Supra, text accompanying n.46.

53. Dina Rizk Khoury, "Merchants and trade in early modern Iraq," *New Perspectives on Turkey* 5-6 (1991), 53-86, at 54.

trade. The protection cost, it is acknowledged, "was just as important as a camel."⁵⁴

In these testimonies, the notion of protection is introduced as an element of what one could nowadays describe as "overhead." Protection costs play a significant role in the determination of the ultimate price of the commodity. This is a common usage, and a practice one naturally finds in dealing with the Islamic world.⁵⁵ This overhead will inevitably come into the price of not how much one buys the commodity for, nor at what manufacturing cost it is produced, but how much it will ultimately cost in order for the trader to make a profit.

As in the realistic opening lines of Sarakhsi's book of sales, the benefit of a sale contract should be appreciated in its wider perspective: "God has made money the reason (*sabab*) for people benefiting from, and enjoying the world."⁵⁶

A CONTEMPORARY ECHO: THE ECONOMICS OF THE LAW MERCHANT

Ten centuries after Dimashqi, Sarakhsi and Kasani, the relevance of trade as an economic 'given' of an Islamic theory of "economics" can be found again in the works of Muhammad Baqer al-Sadr (d. 1980).

Sadr is important in the field of Islamic commerce for several reasons. First, his 800-page book on the Islamic economic system, *Iqtisaduna* ('our economic system'),⁵⁷ and his views on the *Interest-Free Bank*⁵⁸ are two landmarks in 20th century Muslim reflection on the subject. Secondly, the originality of the work results from the heavy use by Sadr of classical Islamic law. In an archetypal search for *longue durée*, one cannot rely on systematic series, which may or not be available for a relatively limited period of time. Sadr was aware of this constraint in his search for an Islamic theory of economics. In contrast, we have seen how the legal tradition is rich and sustained, and Sadr's reliance on *fiqh* to expound the core principles of his system shows the way for trade patterns modelled on legal principles.

Sadr does not question, as did Marxist socialism which was the main object of *Iqtisaduna*'s criticism, the importance of free trade. For him, unimpeded commerce is a given, and the centrality of trade surfaces in the book through Sadr's use of the concept of "distribu-

54. Id., quoting N. Steensgaard, *Carracks, Caravans and Companies* 111 (1973).

55. 'Protection' understood from a positive side is important in whatever business is being undertaken in Middle Eastern countries, and the concept of 'sponsorship' in Saudi Arabia is obviously the most eloquent example of how vital it is to secure financially the attention and the participation of the local powerful people who would facilitate this trade.

56. Sarakhsi, *al-Mabsut*, xii, 108.

57. See *Iqtisaduna* (Our economic system), (1959-61), *passim*. The book is discussed in Chibli Mallat, *The Renewal of Islamic Law* (1993), chapter 4.

58. *Al-bank al-la ribawi fil-Islam* (the interest-free bank) (1969).

tion." Distribution informs the two economic "phases" in which the book is divided: distribution before production, and distribution after production.

Generally, the "apparatus of distribution" is discussed by Muhammad Baqer as-Sadr by way of the two concepts which underpin it, need and labour. "Two essential tools constitute the apparatus of distribution in Islam: labour, and need."⁵⁹ In this perspective, property becomes "a secondary element of distribution,"⁶⁰ and is always limited by a set of moral values and social interests established by religion. The three elements forming the basis of the distributive apparatus of Islam are summarised by Sadr as follows:

Labour is a primary tool of distribution from the standpoint of ownership. The person who works in nature reaps the fruit of his work and possesses it.

Need is a primary tool of distribution as the expression of a human right which is essential in life. Islamic society recognises and supplies essential needs.

Property is a secondary tool of distribution, by way of commercial activity which Islam permits within special conditions which do not conflict with the Islamic principles of social justice. . .⁶¹

From there, Sadr follows up the role of distribution in the two phases just mentioned, distinguishing between "the general theory of distribution before production" and "distribution in the post-production phase." Although he acknowledges that the division is artificial, since "the two studies [of distribution before and after production] are intertwined," Sadr chooses a new angle to address "the sources of production," which he had identified in the pre-production phase as "land, raw materials, and the tools necessary for production." Legal rules of distribution after production, in contrast, are concerned with "productive wealth, which is the goods made by labour as exercised over nature, and results from a combination between these material sources of production."⁶²

The legal framework regulating distribution in the second phase—the productive process—includes the importance of reviving and exploiting the land in its ownership,⁶³ the prohibition of *riba*,⁶⁴ the encouragement of commerce as productive activity and not as intermediation.⁶⁵

59. *Iqtisaduna*, 308: apparatus of distribution, *jihaz at-tawzi*; labour, *'amal*; need, *haja*.

60. *Iqtisaduna*, 321.

61. *Iqtisaduna*, 322.

62. *Iqtisaduna*, 387-88, see also at 524.

63. *Iqtisaduna*, 590.

64. *Iqtisaduna*, 591-92.

65. *Iqtisaduna*, 621-22.

It is clear that *exchange* in its material sense is one of the forms of production. The transportation of wealth from a place to another creates in many instances a new benefit and is considered an enhancement of the commodity's value for human need, whether the transportation is vertical – as in extractive industries, in which production conducts an operation of transport of raw material from the depth of the earth to its surface – or horizontal, as in transporting products to the areas close to consumers, and making them ready for customer use. Such transportation is a kind of enhancement to a better kind with regard to the needs of man.⁶⁶

Sadr carries on with the legal scheme attuning to commerce, by adding, as he does in the rest of the book, a number of legal texts drawn from various scholars belonging to all schools in the classical tradition.⁶⁷ When this is done, the conclusion is the protection of commerce so long as it “has a productive content.”⁶⁸ Intermediation is favoured when it is “a branch of production.” From a famous letter of ‘Ali, the fourth Caliph and first Shi‘i *imam* (d.661 CE), to Malek al-Ashtar, his governor of Egypt, Sadr derives the importance of “good” commerce:

It is clear from this text that merchants as a group are brought into one with the people of industry,⁶⁹ that is the manufacturers,⁷⁰ and they were all portrayed as the providers of benefits. The merchant creates a benefit in the same way as the manufacturer. [‘Ali] followed on by explaining the benefits which the merchants create, and the operations that they accomplish, in securing wealth from far away places, from areas where people [i.e., buyers] do not naturally gather, and where they do not go.⁷¹

So commerce was for Sadr an unquestionable premise for his new ‘economic theory’, even if the legal texts used in *Iqtisaduna* are not typically those relating to commerce. Sadr’s main concern was over property of land, and of strategic resources like oil. In contradistinction to his indirect investigation of Islamic economics by means of *fiqh*, our purpose here is a more direct one, which looks into commercial law as directly expressed in the books, rather than for a more

66. *Iqtisaduna*, 615.

67. “*Al-nusus al-madhhabiyya*,” the texts of the Islamic legal schools, *Iqtisaduna*, 618-20, from Shi‘i jurists like al-Saduq (d.381/991), al-Shahid al-Thani (d.966/1669), and al-Hurr al-‘Amili (d.1104/1693); Hanafis, like Ibrahim al-Halabi (d.956/1549) and al-Marghinani d.593/1197); Hanbalis like Ibn Qudama (d.620/1223), as well as Malek (d. 179/195) and Shafi‘i (d.204/820).

68. *Iqtisaduna*, 622.

69. *dhawi al-sina‘at*.

70. producers, *muntijin*.

71. *Iqtisaduna*, 618.

abstract notion of economics. In the legal field proper, however, not much of a remarkable tradition has remained.

THE BREAK: THE OTTOMAN COMMERCIAL CODE (1850)

Any familiarity with commercial law in the contemporary Middle East shows the lexical and structural chasm between the classical system and the modern codes. Commercial codes are strictly modelled after the civil law tradition in most countries, or, as in Israel, Jordan and Pakistan, occasionally follow the common law tradition. The time-honoured lexicon of classical trade has fallen into disregard.

Nor can the Islamic law merchant be readily transposed into the modern world of commerce, but the dimensions just outlined offer a useful background for the practitioner: distribution comes, as archetypal concern, before production, trade constitutes the nerve of the Middle Eastern city, sale is the paragon contract, custom is crucial to appreciating the operation of exchange and profit in real life, and "real cost" of the transaction, including hidden costs of protection and intermediation, is the bottom line of any trade operation.

None of this seems crucial in modern statutory and court law, as seen in the survey of recent commercial law decisions presented in the first part of the chapter.

In many areas, the ignorance of the tradition is not surprising. Notwithstanding the possible emergence of commercial papers in the Middle East where the *suftaja* seems to have been a long-established model of a letter of credit or even a 'cheque',⁷² the complexities of commercial papers developed decisively only in the twentieth century, and it would have been very hard – though not theoretically impossible – to merge the sophisticated instruments of a rapidly changing commercial scene in the world with remnants of a pre-capitalist medieval system.

How did that break come about formally ?

A clear separation between *fiqh* and *qanun* can be traced back to the Ottoman legislator's introduction, in the middle of the 19th century, of a commercial code which was a direct transposition from the French tradition.

72. See for instance Goitein, *supra* n. 36, at i, 242. Also, Udovitch, "Merchants and *amirs*: government and trade in eleventh century Egypt," *Asian and African Studies* 22 (1988), 52-72, at 66: "Islamic commercial law and practice recognized numerous forms and instruments of credit. For the transfer of an obligation from one place to the other and for its speedy redemption into cash, none was more effective or more efficient than the *suftaja*." A papyrus dated ca 900 CE mentions the word in plural, Albert Dietrich, *Arabische Briefe aus der Papyrussammlung der Hamburger Staats- und Universitäts-Bibliothek* 15 (1955): "*wa qabilu minna al-safatij*" (and they accepted our 'promissory notes'). Dietrich suggests also translating it as 'cheque', at 22. Joseph Schacht translates *suftaja* as 'bill of exchange' (*An Introduction to Islamic Law* 78 (1964)), and Udovitch, in an earlier work cited *infra* n. 136, as 'letter of credit' (at 80).

Unlike for the Majalla, where a real effort was introduced, both in terms of rules and in terms of legal categories, to produce a code inspired by the Islamic legal tradition, there was clearly no regard for the tradition by the Ottoman legislator.

Nor did the Ottoman commercial code of 1850 pay attention to the local conditions long acknowledged by the *shari'a*. Plagiarism was so widespread that the Ottoman borrower did not realize that the dispositions of the French system were totally inadequate to an Islamic society where the wife's property is by definition separate from her husband's in the absence of a regime of matrimonial property. This was noted by an early commentator:

The fourth section of the [Ottoman Commercial] Code relating to the rights of women and the articles that compose it are completely useless, and have not the least practical application in case of the husband's insolvency. Indeed for Ottoman civil law, marriage is nothing else than the legitimate union of man and woman for the exclusive perpetuation of the human race, and excludes any idea of association that would seek mutual help for bearing the expenses of life and family, uniting goods as well as individuals, or improving together, through the separate contribution of matrimonial goods, their lot and sharing it. This joint association between the spouses is neither arranged nor regulated, and this association does not actually exist.⁷³

Thus is underlined the inadequacy of the Ottoman code's extensive regulation (Arts. 264-270) of the matrimonial regime of joint property: "In fact as well as in law, there is always separation, never community of goods between the spouses; the wife keeps the entire and exclusive administration and use of its movable and immovable property, which she disposes of entirely and freely, and which she can sell at any time without seeking authorisation from the husband, and in case he disagrees, from the civil tribunal."⁷⁴ The French model was in this particular case alien and superfetatory.

Blind replication is also true for commercial partnerships, the importance of which does not need to be underlined in modern capitalist societies.

Classical commercial law of Islam does not know those forms of partnership without which the present capitalist world cannot be understood: the limited company. One is then immediately faced with a problem, which derives from the long-term structure which the Islamic law of contract has imposed, regarding the strict individuality of the commercial transaction. But for arguable exceptions of *waqf*

73. Théophile Piat, *Code de commerce ottoman expliqué* (in Arabic and in French) 809-10 (1876).

74. *Id.*, at 810.

(trusts), and *bayt al-mal*, (the public treasury),⁷⁵ partnerships in Islamic law were never recognized as 'corporate entities' which would be separate from the partners undertaking the trade. There is no corporate person in classical Islamic law, partly a consequence of the care for certainty in that system. Islamic law, even with commercial ventures, deals primarily with the individual as bearer of commercial duties and rights, whose word and involvement are essential. The corporate entity, in contrast, is by definition more diffuse. Since the attempts began in the 1850s for commercial codes to be introduced in the Middle East, the field of company law has been torn between the necessity of a faceless legal dimension which is represented by the independent moral personality of a company, and the recognition of known and fully liable individuals in the effective running of the trade.

Borrowing from the west occurred on a large scale across the area. Already the first commercial codification of law in the Middle East appears at loggerheads with any attempt to adopt Islamic rules. The Ottoman Commercial Code of 1850 is a replica of the French commercial code introduced by Napoleon.

As in the case of matrimonial property, plagiarism was such that in the course of the first Middle Eastern commercial borrowing, the Ottoman legislator forgot that it was in the French civil code, and not in the commercial code, that the main regulations of commercial companies are to be found. Hence a skeletal chapter of 10 articles on the *société anonyme*, which was rapidly becoming the most financially important vehicle in company law in France.

In a chapter entitled "the third type [of companies, after the *société en nom collectif* and the *société en commandite*]: *société anonyme*," it is prescribed under Art. 20 that "the company (which does not have a name, *al-ghayr musammāt*) and which we call 'anonyme' does not exist under a social reason. It is not designated under any of the partners' names" and is necessarily "qualified by the designation of the object of the enterprise" (Art. 21). Piat explains that "the mere name of the company, or *société anonyme*, is sufficient to make known the special object which it deals with; it must be confined to it."⁷⁶ The reason for this, a Turkish commentator of the time

75. There is a large literature on *waqf*, with recent work ranging far and wide in history and geography, e.g., from Randi Deguilhem and Jean-Paul Pascual in Syria in the pre-modern and modern period; to McChesney's monograph on the development of a shrine in central Asia over four centuries, to Michael Dumper on the current situation of Muslim foundations in Jerusalem. The legal concept of *bayt al-mal* is elusive. It is discussed in *Report on the Budget in Classical and Contemporary Law* (1996), which is an unpublished consultancy (17 august 1996) by the author on the occasion of the dispute between the ruler of Qatar and his deposed father, then before the High Court in London. The classical text on budgetary 'rules' is by Ibn Mammātī (d.1208), *Kitāb qawānīn al-dawawīn* (Rules of the ministries) (1943) (ed. by A. 'Atīyya).

76. Piat, *supra* n. 73, at 60.

explained, is the necessary dissociation between the company on the one hand, and, on the other hand, "the shareholders and the managers who are not accountable for the expenses and the losses of the company beyond the shares in capital which they paid up and for which they are liable."⁷⁷

Only two articles in the Ottoman Code deal with the management of the *société anonyme*: "The *société anonyme* is administered by time-bound agents who are revocable. They may be shareholders or not, and they may or not earn a wage." (Art. 22) Limitation of liability is established in the next article: "The administrators are liable only for the execution of the mandate they have received; they do not incur, because of their management, any personal or joint liability for the company's engagements." (Art. 23)

This is all one finds for the administration of the *société anonyme*. Rules dealing with shares and shareholders are equally succinct. Article 24 defines the types of responsibility of the shareholders, who "are liable only to the extent of their interests in the company," and the Code deals then with capital and shares: "The capital of the *société anonyme* is divided in shares, and even in fractions of shares of equal value." (Art. 25) In principle, only bearer shares are admitted: "The share is established in the form of a bearer's entitlements (*titre au porteur*); in this case, cession operates by the transfer of title." (Art. 26) But the following article recognised, without naming it, nominal titles: "The ownership of shares is established by their inscription on the books of the company. Cession operates by a declaration of transfer from the company, which is written in the margin of the title, and which will be registered in the company's books." (Art. 27) Registration of the ownership of shares offered evidence which allowed minimal control for the issuance and transfer of shares, even if, as noted then, the Ottoman Code poorly adapted the French model which lists the formalities required for transfer: declaration written in the books, and the signature of the transferor or his representative.⁷⁸

These short articles on the most important commercial company were supplemented by the necessity to seek an imperial decree authorising the company's establishment (Art. 28) and the registration of the articles of association "before the Tribunal of commerce" (Art. 31). In comparison with the two other types of company mentioned in the Code, the *société anonyme* looks like the least favoured object of legislative care. This brevity is compounded by the lean attention to companies overall, whilst other commercial matters were

77. *Sharh qanun at-tijara, lihadrat 'utufatlu wahan afandi* (Wahan Effendi, commentary on the commercial code), Arabic translation by Nuqula Naqqash, Beirut 1297/1880, in Ibrahim Sader (ed.), *Majmu'at al-qawanin al-'adliyya* (collection of civil laws), Beirut n.d., 34.

78. Piat, *supra* n. 73, at 74.

regulated thoroughly, such as the bill of exchange (Title 6, Arts. 70 to 146) and bankruptcy (the whole of Book 2, Arts. 147-288 for insolvency, Arts. 288-315 on bankruptcy). The legislator realized soon afterwards that such an important commercial institution required a more elaborate treatment, which was introduced in a separate law a decade later.

With all its shortcomings, the first Commercial Code in the area offers a model one finds across the Middle East. All the codes are attentive to the detailed treatment of such areas as bankruptcy, commercial papers, the qualifications of the profession of trader, in a relatively straightforward translation of the western models. This has been achieved through the wholesale introduction of comprehensive codes, or through separate laws on the commercial business, offshore companies, commercial procedure, juxtaposed over the years in the field. To this legislation one must add international and regional conventions in special concerns such as maritime and air law, or commercial arbitration.

A list of commercial codes and their contents would be fastidious. These texts are more or less sophisticated. They might have been introduced wholesale, from the earliest, the Ottoman Code of 1850, to the most recent such Code, the Commercial Transactions Law of the United Arab Emirates (December 1993).⁷⁹ Specific commercial statutes may have also been introduced gradually. This was the case in Saudi Arabia from the 1930s onwards.⁸⁰

Thus the gist of commercial law since the first Ottoman codification. It is, however, not possible to read these statutes as complete and absolute replica of western counterparts, and the local practitioner will remain attentive to homegrown specificities, regardless of wholesale borrowing from the west. Indeed, some commercial statutes are particularly important for their specific Middle Eastern flavor, even if they are not necessarily inspired by the *shari'a*.

One area where the Middle East may have developed an institution which is typical, whilst not rooted in an older tradition, is agency law. Here, specific statutes rule the field, which have no Islamic pedigree. While foreign antecedents can be found, their Middle East application was so autonomous that the statutes, with the help of courts, developed a life of their own.

79. See Price, *supra* n. 22.

80. The most important Saudi code is that known as *Nazam al-mahkama al-tijariyya*, passed more than sixty years ago, in 1350 AH. It establishes rules regulating the profession of merchants (Arts. 1-10), including agents, commissioners (Arts. 18-41), companies (Arts. 11-17), commercial papers (Arts. 42-102); bankruptcy Arts. 103-149); maritime commerce (full section 2, Arts. 150-430); the regulation of commercial proceedings, as well as various related taxes and fees (sections 3 and 4, respectively Arts. 432-587 and 588-633).

Agency is in this regard a wide concept, which covers most contracts between foreign manufacturers and local importers. Considering that, outside the oil industry, trade is the nerve of economic activity in the region, the importance of commercial agency cannot be underestimated.

We shall examine now some of the most characteristic legal traits in those countries where free trade is still the rule. Other countries, which have espoused a more rigid "socialist" framework, like Libya, Egypt, Syria and Iraq, may share some of the commercial agency special rules which are under discussion, but the overall economic system remains centered on the state. While trade in other countries of the Gulf, the Levant and North Africa are not free from burdensome constraints, the principle is based on an overall "free" capitalist system. There, the rules on commercial agency go to the heart of commercial law in the private sector.

The Middle East is in this respect full of surprises.

COMMERCIAL AGENCY

A major element of surprise for the foreign manufacturer tends to arise upon a dispute with a commercial agent who might have faithfully represented him over a period of years in a "sole agency" contract which, for one reason or the other, the foreign principal would like to discontinue. For the Japanese manufacturer, the common law practitioner, or the European trader who is used to the protection of Articles 85 and 86 regulating competition in the Treaty of Rome, the snare of the Middle Eastern agency/distributorship is the more surprising in view of the compensation owed by the foreign principal to the agent/distributor: "In common law jurisdictions the principle of autonomy of contract applies with particular vigour to commercial agency. There is no special statutory regime governing commercial agents, no requirement for registration, no principle of compensation to the agent following lawful termination of the agency agreement."⁸¹ In contrast, the typical statutory legislation will run in the Middle East as follows:

No person shall engage in the business of commercial agencies in the state unless his name has been entered in the Register of Commercial Agents prepared for this purpose in the Ministry. *A Commercial Agency which is not recorded in this Register shall not be recognised*, nor shall any claim be heard with regard thereto. (Art. 3)

81. Goode, "Preface," in Samir Saleh, *Commercial agency and distributorship in the Arab Middle East* xix (1995). See generally on the subject my "Comparative models of freedom of trade: the hurdle of Lebanese sole agency," in W. Shahin & K. Shehadi (eds.), *Pathways to integration: Lebanon and the Euro-mediterranean partnership* 209-27 (1997).

An agent shall be entitled to commission on transactions which the principal concludes himself or through another person in the agent's territory, even if such transactions are not concluded as a result of the efforts of the agent. (Art. 7)

A principal shall not terminate the agency agreement in the absence of any reason to justify such action. An agency may not be re-registered in the Register of Commercial Agents in the name of another agent, *even if the previous agency is limited to a fixed term. (Art. 8)*

If an agency is withdrawn at an inopportune time for any reason not attributable to the agent, the principal may be required to provide compensation for any losses and loss of anticipated profits. In the absence of proof that the agent committed a wrong justifying non-renewal, *the principal's refusal to renew an agent's contract after the expiry of its original term shall constitute an abusive exercise of rights entailing appropriate compensation. . . (Art. 9)*

Thus the Federal Law No.18 of 1981 regulating commercial agencies in the United Arab Emirates.⁸² Such legislation is typical of the Arab Middle East, where a principal is forced to retain an agent – in the absence of a major fault – even if the agency agreement comes to an end. Breach of the agreement or failure to renew it will invariably lead the agent to claim compensation, and both the courts and the administrative agencies will play a large role in ensuring that the system is centralised and so tightly protected that any new agent would be either barred or deterred from carrying on the agency until full compensation is paid to the previous agent.

The discontinuation of the relationship, leading as a matter of principle to compensation for the agent regardless of the terms or length of the contract at the origins of this relationship, constitutes a first element of surprise for the foreign observer.

At the legislative origin of such exorbitant constraints on the principal, who tends to be invariably a foreign manufacturer or supplier, lies Lebanese Decree-Law No. 34, issued on 5 August 1967 (amended 1975).⁸³ Decree-Law 34 is the first such law to be passed in the Arab Middle East and represents the prototype for a plethora of agency/distributorship legislative regulations in the UAE, the Gulf and elsewhere, all featuring the same “exorbitant” character as the original:

A commercial representation contract shall be deemed to be made for the mutual benefit of the contracting parties. Therefore, in the event of its termination by the principal

82. As amended by Federal Law No.14 of 1988. Text reproduced in Saleh, *supra* n. 81, at 11-37. Emphasis added.

83. *Id.*, at 3-41.

without any fault on the part of the agent or without any other lawful cause, the agent shall, *notwithstanding any agreement to the contrary*, be entitled to claim compensation equivalent to any damage he may have sustained or to *any profits he may have lost*. (Art. 4 §2)

In addition,

The commercial representative shall also be entitled, *even in the event of termination of the contract by the expiry of its term and notwithstanding any agreement to the contrary*, to claim compensation to be determined by the court, when the efforts of the commercial representative have led to manifest success in the promotion of the trade mark of his principal or have resulted in an increase in the number of his customers and the refusal of the principal to renew the agency agreement has prevented the representative from reaping the profits of his success. (Art. 4 §1)

Thus the first "excessive" dimension: compensation for termination of agency as a matter of principle, regardless of its length or terms.

A corollary "exorbitant" dimension arises in relation to the stringent application of the laws on agency/import by the judicial and administrative set-up within the country. These regulations one encounters with few variations across the Arab Middle East, and vest in the judicial and administrative apparatus which enforces the protection of the agent/distributor in an exclusive contract.

The judicial apparatus tends to be involved in the award of compensation, which is often put, in order to take into account "lost profits," a compensation of two, three, and up to five times the amount of net profits of the annual average rate in the last years of the agency.⁸⁴

The administrative apparatus ensures that, once the agency is breached or not renewed, a subsequent agent would be held jointly liable with the foreign principal for the amount of compensation decreed by the court. In some Gulf countries, the ministry of trade or a specialised committee will refuse the registration of a new agent so long as the termination of the previous agency has not been fully settled.⁸⁵

84. E.g., for Lebanon, various decisions reported in E. Abu 'Id, *Al-tamthil al-tijari* (commercial agency), 2 vols. (1991). An early application appears in a Court of Cassation decision of 15 march 1973, upholding the plea of the petitioner that "compensation is equivalent to lost profit for three years at least and five years at the most, calculated on the average profit of the three last years," *Hatem* (Lebanese law reporter), 142, 1973, 22, at 23. See also generally M. Mahmassani, *La représentation commerciale en droit positif libanais* 408-09 (1972).

85. Centralization is crucial to the system: a decision of the Bahrain Court of Cassation rejected any compensation because the registration of the agency as required by Law 23 of 1975 relating to commercial agencies and their organization had not

In practice, this allows the impounding of goods and the involving of any new agent/importer as a joint debtor in solidum with the foreign principal/exporter by the agent/trader whose contract is terminated or not renewed. The necessity of registering the agency, and the explicit or implicit assimilation of distributorship and agency, are also common features in the area.

Thus arises the second element of dismay: the easy assimilation in the Middle East of the "commercial agent" and the importer/distributor/ trader: "A trader who sells on his own behalf what he purchases in accordance with a contract which grants him the capacity of representative or exclusive distributor, shall be deemed to be the same as a commercial representative."⁸⁶

A distributor will therefore be assimilated in the region to a commercial agent, and will benefit from the exclusive clause even if he buys and sells on his own behalf.⁸⁷ Agent and distributor tend to be amalgamated by Arab statutes, whereas they tend to be radically distinguished for purpose of competition in Europe (Arts. 85ss of the Treaty of Rome) and the United States (the Anti-trust laws). This appears to be the crux of the difference between the legal regime of distribution in the Middle East and its western counterparts, and the one which seems to be conducive to foreign manufacturers shouting blue murder every time an Arab importer claims compensation for the termination of an agreement.

The vast impact on commerce of these regulations explains why, next to corporate work, representation and distributorship offer the commercial practitioner in the Arab Middle East the major point of anchor of daily activity. In a region where commerce and banking have so far constituted the nerve of wealth, Lebanese Decree-Law 34 and its 1975 Amendment, as well as its Arab followers, are a central staple of commercial litigation.⁸⁸

The special philosophy behind commercial agency Middle-East style is illustrated in an expressive decision of the Supreme Federal Court in the United Arab Emirates, which went to the extent of offering constitutional protection to the laws of agency.⁸⁹

been effected. Dawlat al-Bahrain, Mahkamat al-tamyiz, 10 november 1991, MAFQ 14, 1993, 263-267 at 266-67.

86. Lebanon, Decree-law 34, 1967, amended 1975, Art. 1§2.

87. In the UAE legislation noted above, there is no such explicit assimilation, but the necessity to register 'the agency' leads in practice to the assimilation of agent and importing trader. See generally Saleh, *supra* n. 81, at, Chs. 1 and 11; and my book review in *Yearbook of Islamic and Middle Eastern Law*, ii, 635-37 (1995).

88. See for a Kuwaiti illustration within a comparative setting, the extensive analysis of Ahmad 'Abd al-Rahman al-Milhim, "*Mada taqyid 'aqd al-qusr lil-munafasa al-ra'siyya* (Restrictions on exclusive contracts by vertical competition rules)," *Majallat al-huquq* (Kuwait), 20, 1996, 13-108.

89. UAE, Federal Supreme Court (constitutional chamber), 14 april 1993, MAFQ 16, october 1994, 109.

The facts of the case are typical, and concern an exclusive agent selling computers in the country, who had the goods of a parallel importer impounded. A constitutional plea was brought to the Federal Court by the parallel importer, who argued against the constitutionality of Laws 1981 and 1988 on the basis that the *shari'a*, as the supreme law of the land, did not accept such abuse of the market, and that these laws were therefore conducive to hoarding.

The Court demurred, by explaining that if indeed hoarding was illegal under Islamic law,⁹⁰

it appears from reading and analysing the text of the aforementioned law that it leads in no way to the prevention of commercial deals which are the object of commercial agency or the increase in price. These texts only regulated the relationship resulting from the contract of commercial agency between the commercial agent and between the manufacturer or supplier inside or outside the country, or the exporter and the exclusive distributor adopted by the producer. The legislator considers this contract to arise for the benefit of both contracting parties. The legislator did not prohibit its termination or its renewal as the appellant alleges, but allowed, under Art. 8 of the law, the termination of the agency contract by the principal and its non-renewal if there were reasons to do so. The legislator did prohibit the importation of merchandise or produces or manufactured items or other goods that are subject to an official registration with the government with a view to circumvent the agent. It also authorised the principal to use one sole agent in the state considered as one unit or in each Emirate or in a number of Emirates, and it required the commercial agents to provide spare parts, items and appendages which are necessary and sufficient for maintenance of the imported goods. This helps the flow of merchandise and facilitates commercial loans, bringing them within everyone's reach in various areas of great proximity. It leads to preventing the increase in price.⁹¹

The Court went on to explain that this competitive reality "is not affected by the last section of Art. 5 of the Law on the exclusivity of the distribution of merchandise and services which are the object of the agency to the commercial agent within his territory, since the object of the agent is always to sell these products and to trade them in order to get his commission. This encourages him to lower its price as much as possible, and to accept a small profit in order to reach this

90. Quoting the *hadith*, "*al-jalib marzuq wal-muhtakir mal'un*, the provider will be rewarded and the monopolist chastised," at 112.

91. At 110-11.

aim and stand on a par with other companies which produce goods with the same object and put them on offer in a competitive set-up with low prices. In addition, a failure in distribution or an attempt to hoard these goods to increase their price could be a reason that his principal might use to terminate the agency or to refuse its renewal."⁹²

In conclusion, the Court said, "the rules of this law do not encourage the hoarding which is prohibited by the *shar'* and does not lead to it. There is nothing in it which violates the rules of Islamic law, and consequently constitutional provisions. The appeal lacks base and should be rejected."⁹³

One can see in the Court's explanation a sophisticated battery of arguments in support of the agency/import laws of the UAE, some of which textual (the Prophet's sayings, *hadith*), some of which economic (prevention of monopoly, encouragement of interbrand competition), some legal (mutually beneficial contracts). All in all, the constraining statutes are upheld in the name of a hazy, but real, commercial public order.

These explanations can be supplemented by the remarks of Lebanese commercial judges in an early case: for the Beirut commercial court, only an *exclusive* distributorship would be entitled to the protection of Decree-Law 34, and the seller could come to an agreement with others at any time in the absence of the exclusivity clause.⁹⁴

"Irrespective and notwithstanding all the aforementioned," the Court held, "it is impossible, either from the point of view of social justice, or from an economic point of view, and in view of Lebanon's relations with the outside world, to expand the interpretation of Article 1 section 2 of Decree-Law 34, which does constitute a statutory exception undermining general principles and contradicting all established known legal rules and all usual practice in commerce, so that it is necessary to interpret the decision in a limited way, which restricts its application to commercial representatives who possess the quality of exclusive representatives or distributors, and who are harmed in absolute from the rescission of the contract binding them to their principal with regard to distributing a specific type of merchandise."⁹⁵

Thus a further rationale, under which the statute must be narrowly interpreted because both agent and principal are limited to "specific types of merchandise," and because the distributor will not benefit from the protection of the law so long as his contract is not

92. *Id.*

93. At 111.

94. Mahkamat bidayat beirut al-tijariyya (commercial court of Beirut, first instance), 23 december 1969, reported in Abu 'Id, *Al-tamthil al-tijari*, i, 55.

95. *Id.*, at 60.

explicitly “exclusive.” Once it is so labelled, it is surmised, there is no reason why the supplier should not be held to the contract he wilfully signed.

The laws on commercial agency are well established in most open markets in the region, even if, under the new conventions which powerful economic actors like the European Union are negotiating, the excessive protection of exclusive agents-distributors is targeted in the name of free competition and consumer protection. The return to “freedom of trade,” which is translated in this case as the illegality of exclusive agencies, has been put forward in countries like Jordan, Tunisia and Lebanon by treaties passed or to be passed with the European Union. The rationale behind those conditions, from the EU drafters’ perspective, is that consumers are the main victims of such segmented and exclusive arrangements.⁹⁶

In the overall philosophy of commercial law, laws on commercial agency have a strange and inconclusive pedigree.

From the perspective of the *shari’a*, principled opposition to the restrictions appears in the plaintiff’s arguments in the UAE case: agency contracts are freely revocable under classical law, and forcing the principal to compensate an agent upon revocation of agency is beyond the contemplation of the straightforward doctrine as can be found in the *fiqh* books. The principle is that an agency is revocable at any time, and that no compensation is owed: “agency is a non-binding contract, . . . and a separate judgment cannot be entered thereupon. . . The principal may terminate the agency whenever he wishes, on condition of informing the agent.”⁹⁷

Agency is, with regard to the *shari’a*, close to its equivalent under the Common Law. The Arab rules on commercial agency appear, in contrast, as typical illustrations of the prohibited practice of “restraint of trade.” Regulation and compensation as discussed would not pass muster in a Common Law court, although a more nuanced conclusion may be warranted as soon as the agency becomes more specifically regulated. This would be the case in the increasingly complex variations taken by the new “distribution networks,” which include franchises and what English courts call “solus agreements.”⁹⁸

Whilst not rooted in the *shari’a*, Middle East agency law might have another historical pedigree, which is French. The Lebanese stat-

96. For details on the EU treaties and practice and their implication for the Middle East, see “Comparative models,” 223-27.

97. “*Al-wikala min al-‘uqud ghayr al-lazima. . . wa la yasuhh al-hukmu biha maqsudan. . . fakan lil-muwakkil al-‘azl mata sha’a bi-shart ‘ilm al-wakil.*” Ibn Nujaym (d.970/1563), *Al-bahr al-ra’eq fi sharh kanz al-daqa’iq*, with the supercommentary of Ibn ‘Abidin (d.1252/1836), 8 vols., Cairo 1311 AH, vii, 204.

98. See *Esso Petroleum Co. Ltd. v. Harper’s Garage Stourport Ltd.*, 1968 [A.C.] 269, per Lord Wilberforce for the difficult distinctions made by the Lords. Also G.H. Treitel, *The Law of Contract* (1991 ed.), 418ss.

ute of 1967 (modified and reinforced in 1975), which is the model for most Gulf legislation, owes much of its formulation to a French statute passed in 1958.⁹⁹ Unlike that French precedent, however, which remained limited in scope to a narrow category of commercial agents in France, the expansive concept of exclusive agency is a homegrown Middle Eastern product, which has adapted the logic of importation for the benefit of powerful merchants in the countries concerned. One can read many interpretations in the dominance of these statutes from their birth in the 1960s to date: they may be the local adaptation of French law, which was reinforced by a pattern of trade based on imports of manufactured European or Japanese goods. They may be, if projected further in the past, the commercial distribution equivalent of foreign concessions on trade, especially concessions on oil; or even concessions on large projects like the digging and operating of the Suez Canal. If so, there is an example here of the transformation of previous colonial patterns of dominance by the local elite for its own benefit. It may also be that the larger merchants have forced these statutes to protect themselves from the diktat of foreign agents, or from interference by local competitors: "[I]t would be a dangerous thing if one citizen started corrupting the relationship of other citizens with foreign companies and worked for the termination of their agreements."¹⁰⁰ It may be, more prosaically, that big merchants are defending their turf against local competition by smaller merchants, or indeed dividing markets up.

Whatever the explanation, commercial agency in the Middle East is a typically local phenomenon, which dominates the patterns of trade in the region. As a specific regional manifestation, it may simply obey the universal rule that *lex mercatoria* is primarily the law of merchants, and those merchants will not be constrained in their choice of law by other interests than the ones that suit them.

"Beware" is the practical advice to any foreign manufacturer who seeks distribution of its products in the region. Compensation for appointing a new agent without having settled with the previous one can be costly.¹⁰¹

99. The origins of the Lebanese law lay in French Decree 58, passed on 23 december 1958, to protect the category of commercial agents. The French law is discussed in J. Hémard, "Les agents commerciaux," *Revue Trimestrielle de Droit Commercial* 573-624 (1959). The law was amended significantly by European directives. For further references, see Mallat, "Comparative models," 217-20.

100. As per the decision by the Saudi Board of Grievances in 1995 (no precise date), reported in *Middle East Commercial Law Review* (hereinafter MECLR) 1, 1995, 23, with a comment by N. Saleh.

101. In a 1996 case from Saudi Arabia, a German principal with an agency established in 1985 and terminated less than a decade later had to pay about 2 million USD in compensation to the agent, MECLR, 3, 1996, A-42. This was calculated in commission fees over a period of two and half years. In Lebanon, the courts award typically two to three years, perhaps even up to five in long-established, of net annual profits of the agent. See n. 84 *supra*.

COMPANY LAW

Commercial agency rules may offer a specificity that is typical of trade networks and practice as developed in the modern Middle East. A similar argument, but one which may have a deeper legal pedigree, can now be pursued in the area of company law.

Having noted the absence of a developed concept of 'company/corporation/société' in the Ottoman Commercial Code of 1850, an easy explanation could be put forward. Why should one be surprised, that argument goes, not to find elaborate 'limited liability companies', especially in the form of 'public corporations' or 'sociétés anonymes', when such corporations were themselves in their infancy in the western legal world of the 19th century? There is no reason to suppose that the Ottoman Empire, or Egypt, would resist the adoption of the limited liability companies because of an absence of such legal entities in the Islamic law tradition. It would be merely sufficient, the argument continues, to note that the early codes are contemporaneous with a legal system which, in the west, is much less sophisticated than at present.¹⁰²

There may be more to the matter than the appropriate historical dating of the emergence of codes, and the argument about resisting the limited liability of shareholders should be examined more closely in the context of an absent tradition of 'corporate personality' and of 'limited liability' in a Middle Eastern context.

As aptly expressed in a recent judgment in the English commercial court, Middle Eastern companies are often the vehicles of individual entrepreneurship: "The plaintiffs are a company registered in Nassau and the defendants are a company registered in London, but the real protagonists in the dispute are individuals. . . The evidence that I have heard suggests to me that the two companies are no more than convenient corporate vehicles for the business activities of their principal shareholders."¹⁰³

The sore point relative to company law and the lack of a separate corporate personality can be seen in operation in three major fields: limited liability, capital markets, and Islamic, as opposed to western-style, banking.

102. A good work on companies in the Arab world can be found in Gian Maria Piccinelli, *La società di persone nei paesi arabi* (1990). Although focused on partnerships, it offers a comprehensive guide to relevant company codes and literature. See charts at 247-51, and index of codes, 267-78. For the standard comparative work on company law in the west, Alfred Conard, *Corporations* (1st ed. 1976), rpt. 1991.

103. Justice Phillips in *Lemenda Trading Co. Ltd. v. African Middle East Petroleum Co. Ltd.*, Queen's Bench Division, [1988] 1 All E.R. 413.

LIMITED LIABILITY

All Middle Eastern countries have adopted equivalents to the French system of *société à responsabilité limitée* and of *société anonyme*, which make a strict separation between the assets of a company and the individual assets of shareholders and directors.

One will find several decisions in which the limitation of liability is firmly entrenched. The standard principles can be found as early as the Ottoman Code of Commerce.¹⁰⁴ They are repeated in the first formulation of the Saudi commercial law, which defines the '*inan* company'¹⁰⁵ as "a company between two or more persons, with a specific capital in which each of the partners has a limited share, and in which the partner does not suffer a prejudice or a loss beyond his share in the capital."¹⁰⁶ The principles of limited liability are repeatedly elsewhere in the codes, and a recent case from Kuwait sums them up:

The principle in the limited liability company [the French-style SARL, *société à responsabilité limitée*] is the liability of each shareholder to the extent of his share. . . [This] liability is limited to the extent of his shares in the capital of the company, which is the main characteristic of this company, and from which it derives its appellation [as '*limitée*'].¹⁰⁷

Yet both law and the business world have not fully digested the separation, and some courts are reluctant to stop at the company's assets in case of unfulfilled debt.

This phenomenon is difficult to document in the absence of systematic law reporting, particularly in the Gulf states where the size and importance of the companies in the wake of the oil boom is evident. Legal practice, as far as can be ascertained from lawyers and businessmen, confirms the difficulty, in countries where the persona of the directors and major shareholders of companies is paramount, in limiting liability to the capital and assets of the company, without touching upon the personal property of the decisive actors in such business ventures.

The example of the BCCI, whose major shareholder in the person of the ruler of Abu Dhabi was called upon to foot the bill beyond the bank's assets and who obliged the bank's creditors beyond what the

104. Art. 24, quoted *supra*, in the section on the Ottoman commercial code.

105. — "one of the branches of which is constituted by the limited liability company"—Nizam al-Mahkama al-tijariyya, Art. 14. The limited liability company mentioned here is the French *société anonyme*, *sharikat musahama* in the original Arabic.

106. Art. 13.

107. Dawlat al-Kuwait, Da'irat al-tamyiz fi mahkamat al-isti'naf al-'ulya (high court of appeal), 2 may 1984, MAFQ 9, 1989, 336-338, at 337.

law of limited liability should have exacted, is a prime example of this *intuitu personae* of company practice in the Middle East.¹⁰⁸

While the problem seems to have arisen in similar terms from Saudi Arabia to Morocco,¹⁰⁹ three fully reported decisions from the United Arab Emirates and Bahrain illustrate the difficulty for courts to accept limitation on liability. Although the rulings do not altogether dismiss the principle of limited liability, the dilemma facing the judges is evident in the argumentation. Thus in Bahrain:¹¹⁰

Even if the established principle is, in the limited liability company (SARL), limitation to the extent of [the shareholders'] shares in the company and the impossibility for the company's creditors to ask them [for the company's debts] or execute [the debt] against their property; nevertheless, if the direction of the company is entrusted with one of the shareholders, on his own or with others, then he is subject to the rule of Art. 235 of the Law on Commercial Companies, which establishes the joint liability of directors towards the company, the shareholders and third parties for contravening the legal rules or the company statutes or committing a fault in the management in accordance to the rules of the joint-stock [*société anonyme*] companies. The creditors of the company, as third parties, can therefore attach the directors' *private* monies for damage resulting from their wrongful management.¹¹¹

Allowing creditors to go after the private assets of the directors/shareholders was made possible here by a swift amalgamation of legal rules by the Bahraini Court of Cassation. It is also found applicable in the case of bankruptcy. "This personal liability remains," the Court continued,

108. See the remarks of Rashid Safa, "Perspectives on bank failures in the Middle East" in H. Lewis Ruttley & C. Mallat (eds.), *Commercial Law in the Middle East* 155-65 at 160 (1995): "A striking feature of the BCCI failure is the aggressiveness with which the banking regulatory agencies in the major countries in which BCCI was operating had been soliciting contributions by the majority shareholders of BCCI, particularly from the Abu Dhabi Investment Agency. The contributions were to offset the losses incurred by the bank, which amounted to a staggering \$11 billion by the time BCCI closed down. These agencies presented a strong moral, *though not legal*, case by capitalising on the public outcry, the widespread extent of the fraud committed by the managers of the bank, and the unprecedented amount of BCCI's losses. This 'moral' case forced the Sheikhdom of Abu Dhabi to make substantial payments to compensate depositors." (emphasis added). On BCCI generally, Ibrahim Warde, *BCCI: Perspectives from North and South* (1991).

109. A similar dilemma in Morocco was presented in a communication of Abdellatif Mechbal, "Le rôle unificateur de la cour de cassation marocaine en matière commerciale" (read in Arabic at a conference on "Les cours judiciaires suprêmes dans le monde arabe"), Beirut, 15 may 1999.

110. Dawlat al-Bahrain, Mahkamat al-tamyiz (court of cassation), 8 march 1992, MAFQ 16, 1994, 307-310.

111. At 308. Emphasis added.

even after the dissolution of the company and its liquidation, so long as the directors remain in management and are considered liquidators before the appointment of an [official] liquidator under the terms of Art. 258 of the Law. This is the case regardless whether the behaviour of the directors leading to compensation is considered a crime under the terms of the Criminal Code or the Law on Commercial Companies.¹¹²

To further assert the possibility to go after the personal property of the directors, possibly because the creditors were unable to execute a judgment in their favour, ten years earlier, "due to the company's lack of a legal presence in Bahrain at the time of enforcement,"¹¹³ the Court did not stop at one director. It made all directors (typically also the main shareholders) jointly liable on their personal wealth in the process: "If more than one director is responsible for the wrong, they were all liable jointly."¹¹⁴

Another recent decision, from the UAE, faced a similar dilemma between limited liability and personal assets. Notwithstanding the results in the case, which is not very clear, the language used by the judges runs against the most basic principles of the restriction of shareholder responsibility to the limited extent of their investment.¹¹⁵

The case is a complex one procedurally, and dovetails with a previous case. In the earlier decision, the court of first instance had decided a sum of money, together with interest, for the plaintiff, a bank which had advanced funds to the company in which the defendant and others were shareholders. On appeal, the defendant alleged that he was responsible "only to the extent of his shares in the profits of the company, which are 27.5%."¹¹⁶

It is not clear, in the decision of the court, what the ultimate result was. The ruling was that the owner of the 27.5% of shares should pay that rate of the company's debt from his own private assets. So the court accepted the appeal in part, concluding that the decision in first instance be "varied, by annulling the judgment in its ruling about debt solidarity between the appellant, the first defendant company, and the rest of the shareholders, and about interest, and the rejection of the remainder of the pleas in appeal. The appellant must pay the costs for the appeal."¹¹⁷

112. *Id.*, at 310.

113. *li-'adam wujud kiyan laha fil-Bahrain waqt al-tanfidh*, at 309.

114. *Id.*, at 310. Wrongful and fraudulent management by directors, leading onto joint civil liability *in solidum* for all, can also be found in legislation outside the Middle East. But the wide reach of the above decisions should be noted.

115. *Al-imat al-'arabiyya al-muttahida* (UAE), *Mahkamat isti'naf Abu Dhabi* (Abu Dhabi court of appeal), 30 may 1984, MAFQ 5, 1987, 305-313.

116. At 308.

117. At 313.

More importantly, the court's reasoning exposes the dilemma faced by the interface of classical Islamic law rules and modern company liability:

It is usual under Islamic law (*shar'*) that in case there is no clause of solidarity in the statutes of the company, and if the company is indebted with money related to its objects and the company's assets are not sufficient to pay back the debt, the shareholders (partners, *shuraka'*) are liable *in their own assets* for payment of the debt to the extent of the share of each in the losses of the company (Art. 671 of the project of civil transactions). The result is the liability of the company for its debts on all its assets, in addition to the responsibility of the shareholders/partners who are not bound *in solidum*, to the extent of the share of each one of them in the company's capital.¹¹⁸

One can see in this text the difficulty in conciliating the two principles of unlimited and limited liability of partners/shareholders.

More generally, these cases illustrate the competition between the two laws: the positive limited liability law, and the classical law in which persons are responsible on their personal assets. On the one hand, "the first thing which needs to be taken into account is the emergence of a corporate personality of the company and assets which are independent from the wealth of the shareholders, as appears in the legislator's acknowledgment of the rules of the project of a Code of civil transactions, which is near completion. . ." ¹¹⁹

On the other hand, the larger picture is governed by the principles of the *shari'a*, which the Court mentions extensively *obiter*.¹²⁰ It results, as cited above, in the conclusion that "the shareholders are liable *in their own assets* for payment of the debt."

The Abu Dhabi Court of Cassation, in a more recent decision, also upheld a decision in appeal in which "partners. . . will be jointly liable even if the company was a limited liability company."¹²¹ The Court, however, based its ruling on the fact that the shareholders in the company in question could not avail themselves of the limitation to their liability because the company had not been properly registered.

CAPITAL MARKETS

While all these borderline cases illustrate the dilemma caused by the fact that the classical legal system did not know any limitation on liability, a second derivation of the classical system's legacy may be

118. At 312. Emphasis added.

119. At 311.

120. Full text at 311.

121. MELCR 1, 1995, 26, report of Essam Al Tamimi.

illustrated in the difficulty to find effective stock exchanges in the Middle Eastern Muslim world.

As a general pattern, most trading in commercial papers or otherwise takes its course in discreet, private, environments. On occasions, secondary market places appear as de facto stock exchanges, but there is much to achieve in terms of volume and of business practices before a solid stock exchange starts functioning in the region, a fact confirmed by the noted absence of a value-added oil derivatives market in the Gulf.¹²² Where a relative experience briefly developed, as in Kuwait, the collapse was prompt. In Suk al-Manakh, an informal financial market rose in the 1970s, but the whole structure collapsed in the circularity of inflated commercial paper trading in 1982.¹²³ A similar collapse took place in the Tel-Aviv stock exchange in October 1983, but stricter regulations have since been introduced.¹²⁴

Indication of the difficulty faced by stock exchanges can be found in the dearth of good research in the subject in the Arab world. To my knowledge, no serious publications are available in Arabic, despite well-attended meetings of a number of Arab capital markets conferences.

Two exceptions—in English—will confirm the rule: one is an ESCWA regional report, which notes that “most of the stock markets in the Economic and Social Commission for Western Asia (ESCWA) region are still in their infancy, lacking experience and with a relatively underdeveloped status, particularly in terms of laws, regulations and accounting systems.”¹²⁵ “In terms of performance,” the report explains, “most stock markets in the ESCWA region are highly speculative and thus volatile. This imperfection stems partly from their status as underdeveloped, as lack of data and economic information in public shareholding companies give room to speculation and anticipation.”¹²⁶

122. Fadel Chalabi, “*Mustaqbal al-naft fil-sharq al-awsat* (the future of oil in the Middle East),” in *Al-muqawwimat al-fikriyya wal-qanuniyya li-nizam sharq-awsati jadid* (the intellectual and legal frameworks for a new Middle East), conference held at SOAS, London 19-20 december 1994, *Proceedings*, 7.

123. Fadwa Adel Darwiche, *The Gulf Stock Exchange Crash: The Rise and Fall of the Souq Al-Manakh* (1986), for a popularized view. The fallout was evaluated at \$40 billion.

124. On the early experience of the Israeli “emerging market,” see Abdo Kadifa & Chibli Mallat, *The Third Stage of Zionism: High Technology in Israel*, Centre of Near and Middle Eastern Studies (SOAS, University of London), occasional paper 1, May 1988.

125. ESCWA Stock markets in the ESCWA region, New York 1995, 1. (United Nations, E/ESCWA/ED/1995/3/Add.1, 4 december 1995, hereinafter ESCWA report). ESCWA countries are Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Oman, Palestine, Qatar, Saudi Arabia, Syrian Arab Republic, United Arab Emirates and Yemen.

126. *Id.*, at 1.

In terms of "legal, regulatory and institutional frameworks," the report divides the countries under study into three groups. One group is that of the wealthy oil states with 'capital surplus', and includes countries like Kuwait, Oman and Bahrain which are in the process of "developing the necessary institutional and regulatory structures, starting with the stock exchange." At the time of the report, Qatar and the UAE were still considering the establishment of stock markets, but Qatar has since adopted a law¹²⁷ and opened up the Doha stock exchange in May 1997. Among the capital surplus countries, Saudi Arabia has "opted for a screen-based floorless securities trading mechanism managed by a specialized department in the Saudi Arabia Monetary Agency," which is the equivalent of a central bank. Beyond the formal institutions, one is still hard pressed to find the premises of a really independent stock exchange in operation in any of those countries.

Nor is it, one should conclude from the report, much more hopeful in the rest of the jurisdictions surveyed: countries like Syria, Libya and Iraq do not have the minimal basis of free trade that would allow the consideration of stock exchanges, and the establishment in Baghdad of a stock exchange in 1992 is a particularly cruel example of façade modernism in a country which is as closed upon itself economically as it is isolated internationally.

A more hopeful experience may be found in the third group identified by the report. It includes Jordan, Egypt and Lebanon (and, outside the ESCWA remit, Tunisia and Morocco). In these countries, the search for stock exchanges is premised on the opening up to foreign capital and the prevailing sense within the authorities that domestic stock markets have a key role to play in financing economic growth. When one looks at the figures of market capitalization, however, and those of listed companies and their growth, the experiment remains paltry even in comparison to developing markets in neighbouring Pakistan and India, or further afield in South East Asia: "The ESCWA region's stock markets represented in 1993 only 0.6 per cent of the total capitalization of the world's stock markets, while the region's GDP represented about 1.3 per cent of the world's total."¹²⁸ As for listings on the stock exchanges, there were 1,204 listed companies in the stock markets of the region in 1993, which "represented only 8.2 % of that of the emerging markets and 6.8 % of the developed markets." These figures must be further mitigated by the fact that very few companies listed are active. In most Arab countries with a stock exchange, the listing of seriously active companies

127. Reference in Najeeb al-Nauimi, "Qatar," in *Yearbook of Islamic and Middle Eastern Law* iv, 371-73 (1997-98).

128. ESCWA report, at 8.

rarely reaches the two-digit figure. Even then, only a small part of the companies' share is on offer.

Among the countries described by the ESCWA report as closer to an operational stock exchange, we have a comprehensive policy study explaining the pitfalls facing both the private and public efforts to establish an effective framework for *the development of Lebanon's capital markets*.¹²⁹ It is useful to examine some of its conclusions.

In Lebanon, both the central bank and the stock exchange are heavily dependent on governmental regulations, as they would be in any other country; but they are more top-heavy due to the overbearing intervention of the government in the institutional framework of the Central Bank and the Beirut Stock Exchange (hereinafter, after its French appellation, "the Bourse"). For all intents and purposes, the Bourse exists only on paper. The Central Bank is a sprawling and powerful institution.

The main problems of the stock exchange are clearly underlined in the report. The Bourse was created in 1920 and, after several amendments through to 1985, the "development in the legislative framework did not improve the Bourse perspectives which remained very narrow and marginal thus unable to channel short-term capitals into medium and long-term credits via stocks and bonds. . . In fact statistics show that since the early 60s and till the mid-70s at the outbreak of the war, the yearly volume of transactions in the Bourse did not exceed 0,70 % at best of the total volume of deposits in the banking sector. In most cases, this ratio stood at less than 0,60 %."¹³⁰ As a result, the Bourse suspended its activities in 1983, with only 46 firms being quoted, and, in effect, trading remaining concentrated in a mere 15 companies.

For this ineffectiveness, the authors of the report mention several reasons, to which they suggest legal and financial correctives: one problem is the closed system of companies "owned either by a very small number of persons or at best by families," who have few problems raising money with the commercial banking sector, itself – one may add – aflush with oil money in the 1970s, and itself sharing its directors and executives with the larger Lebanese industrial firms.

As for the commercial code, which was promulgated in the early 1940s, it is not developed enough to accommodate the emergence of new and more sophisticated tools in financial markets across the world. In addition, the authors note "the absence of an effective supervisory authority," although when one looks at the structure of the Bourse, governmental input through the ministry of finance and the

129. Nasser Saidi & Samir Nasr, *The Development of Lebanon's Capital Markets* (1995).

130. *Id.*, at 285.

‘committee in charge of the Bourse’ would indicate that the government has actually stifled the system through a bureaucratic network of controls. More pointed is the remark that “shareholding companies have not respected the principle of transparency in their accounting practices and financial statements.”¹³¹

What are the suggested reforms? In part, the authors may be enlarging governmental meddling by suggesting, *inter alia*, the creation of a control commission whose main mission would be to guard, protect and control the safety and regularity of operations. They also advise the government to “enlarge the Exchange Committee by including people with financial and economic expertise in it,” to “amend the Beirut Exchange Laws and enact the necessary laws in the Code of Commerce to improve the role of public joint-stock companies at the expense of personal or family-owned one.”

This is easier said than done, and the multiplication of laws and by-laws as well as the appointment of more bureaucrats “with financial and economic expertise” does not necessarily decrease the overbearing control of the Ministry of Finance.¹³² But mostly, “personal or family owned” companies make up the basic social structure of capital ownership in Lebanon. The intertwined complex of family politics, clientelism and power, makes it difficult to see closely family-controlled companies giving way to the anonymous dynamic of a stock exchange. As for the creation of fiscal incentives to open up such companies to professional accounting, which has already been undertaken by a vast overhaul of company taxation law, and the lowering of rates across the board to 10% of company profits and 5% of dividends,¹³³ it will take some time for them to filter down the system in order to effect company transparency hoped for by the authors. That is, if low taxation of companies remains.

A more important hurdle in Lebanon is the sacrosanct banking secrecy law, which remain beyond the contemplation of legislative reform. In the absence of the possibility for the government to investigate the financial system under the secrecy law, one is hard put to find a solution to the multi-layered throttle to anonymous capital, which is the backbone of any stock exchange.

The survey of Lebanon’s prospects for serious capital markets shows the continued limitations which face the Middle Eastern legislator in this field. Despite the hopes expressed in the policy report, which was finalised in late 1994, it is hard to find any determined follow-up to the wide range of measures therein suggested:

131. *Id.*, at 286-87; on government custody and organisation of the Bourse, see also 292-95.

132. *Supra* n. 129, at 299-300.

133. See Mallat, “Lebanon,” in *Yearbook of Islamic and Middle Eastern Law*, i, 216-17 (1994).

The authorities will be proposing legislation to enact a comprehensive Capital Markets Law. A Beirut Capital Markets Board (BCMB), set up as an independent authority under the capital markets law, would have overall responsibility for the organisation, regulation, supervision and control of markets, participants and securities. The BCMB would have a large degree of autonomy and independence in setting policy for the financial markets and their development, similar to the 'Banque du Liban' in determining monetary policy. Its governing board would have the equivalent of ministerial status. This independence from government is important for ensuring long-term financial market stability. An independent Beirut Capital Markets Commission (BCMC)—accountable to the BCMB—would act as the supervisory authority and industry 'watchdog'. Broadly, there will be three organizations: the Beirut Stock Exchange (BSE), the Beirut Money Market (BMM) and a central depository and clearing organisation.¹³⁴

Of these, only the Bourse had started again, in 1995, after considerable infighting between its would-be directors, and its activity dwarfed by the secondary market until the listing of the shares of the country's largest company on the Bourse.¹³⁵ But even then, the close association of the company with a narrow political circle of government officials has kept the ties between market and political clout dangerously intertwined. Regardless of the fate of one company, one thing is certain: so long as the most serious sector in the economy of Middle Eastern countries, that of banking and big industry, including oil, remains outside the structure of the stock exchange or of secondary markets, it is unlikely that capital markets will in turn appear serious.

This is not for lack of some circles wanting the development of these markets across the region, who need a more fluid capitalisation of the economy. For private foreign investment, the absence of a stock exchange prevents an exit strategy, and deters large-scale financing.

Nor, considering petrodollars, is the absence of mature stock exchanges simply a matter of available liquidities.

One of the possible explanations may be function of the profound individualism in the tradition of Islamic law, which is manifested in the difficulty to find in the classical age anonymous shareholders'

134. Saidi & Nasr, *supra* n. 129, at 22-23.

135. Solidere, which is the 1991-established Lebanese Company for the Development and Reconstruction of Beirut Central District, with a capital of almost 1.9 billion dollars. It traded in secondary markets until 1996, when it was formally listed in the Bourse. See Mallat, "Lebanon," cited above n.133, 216; see also G. Mahmassani, "Law and Reconstruction in Lebanon," in Lewis Ruttlely & Mallat, *supra* n. 108, at 39-73, at 50-55.

partnerships. Since the paragon partnership engages only two parties as in the partnership for profit and loss,¹³⁶ which typically engage them in a single transaction, no limited liabilities companies have seen the light in the classical age.

This, however, must be a guarded conclusion. Without more careful research, the absence of effective stock exchanges cannot be simply limited to a Weberian-like explanation by way of the dominance of legal “individualism” in business for the Muslim world. As noted by the two available studies on stock markets, a healthy and diversified listing of companies with minimal transparency is required. Still, one may legitimately wonder whether the legacy of a Middle Eastern legal pattern which snobs anonymity or limited liability might not constitute the larger hurdle to the emergence of a successful stock exchange.

Another factor in contemporary societies is the extensive statist tradition in most “socialist” countries of the post-independence era, like Naser’s Egypt, and Syria and Iraq under the Ba’th. In historical terms, the oldest stock exchange appeared in Egypt, which never developed in any significant manner besides the commercial market represented by the industry of cotton in Alexandria.¹³⁷ That experience did not outlast the Naserite period, and it is no coincidence that talk of a stock exchange happened only with the so-called economic opening up – the *infatah* – which timidly started in the 1980s.¹³⁸ Nor are the Gulf states less statist-oriented, in their own way, as rentier-type oil economies slow down the creation of independent and diversified markets.

Whatever the reasons, it is significant that all attempts to organise stock exchanges have remained constrained by both the volume of the transactions and the effective participation of shareholders.

This did not prevent many bourses from finding their way to the statute books across the Middle East. Even buildings have been dedicated for their purpose, but the stock exchanges have not yet outgrown their vacuous shells.

136. On companies in classical Islam, the standard work is by Abraham Udovitch, *Partnership and Profit in Medieval Islam* (1970).

137. The oldest organised ‘market/commercial exchange in the region was set up in Alexandria in 1861, and directed towards the sale of cotton and related manufacturing and transport industries. By 1927, there were two cotton-related commercial exchanges sites in Alexandria, one in Khartum, and a stock exchange in Cairo. None is significant presently. See for the early regulation of stock exchanges in Egypt, Muhammad Amin Kamel Malash, *Sharh qanun al-tijara* (commentary on the commercial law), 2 vols, Cairo ca 1928, ii, 171-215.

138. On which Hill, “Laws of investment, privatization and labour in Egypt,” in Lewis Ruttley & Mallat, *supra* n. 108, at 115-51; Alan Richards & John Waterbury, *A Political Economy of the Middle East* (1991), chapter 9, 238-62: “The emergence of *Infatah*.”

ISLAMIC BANKING

Formally within company law, banking is at the heart of modern economic life, in the Middle East and elsewhere. Western-style banking, meant here in its capitalist and socialist-nationalized versions, dominates the region, where the main division operates between a nationalised banking system such as in Iran, Egypt, Algeria, Syria, Iraq, Libya, and a private or mixed sector as in the Gulf states, Israel, Lebanon, Morocco or Tunisia.

This section does not intend to examine banking law in its dominant, western dimension, which generally follows the rules and regulations of older, well-established, western counterparts. Rather, attention is directed to the so-called phenomenon of "Islamic banking," which emerged idiosyncratically in the early 1960s in rural Egypt, but which has expanded significantly since the mid-80s, whilst continuing to account for a mere fraction of commercial transactions conducted in western style: "As of early 1999, Islamic financial institutions, including banks and non-banks (securities firms, mutual funds, insurance companies, etc.) were present in more than 70 countries. Their assets exceeded the 200 billion dollars mark."¹³⁹

There is, considering this expansion, an understandably large literature on the subject, and several books have appeared in the past few years, some more felicitous than others. Of concern to this overview is Islamic banking as a third 'derivative' product of the classical system in its contrast and competition with western commercial law. Unlike the problem of limited liability and the difficult emergence of stock exchanges, the Islamic banking phenomenon appears in a positive form: the search for new institutions which incorporate a real or hypostatised Islamic financial tradition in which interest is shunned.

The flight into Islamic banking is arguably one direct means which society has adopted to revive an abandoned commercial tradition. The advocacy is a clear one, and runs along the following lines: let's go back to the tradition in its pure form, get rid of interest, and establish a *riba*-free Islamic banking system. With such an ambitious challenge, immediate problems were bound to arise, both on the governmental level and in private ventures.

There is no dearth of hurdles on the way of Islamic banking. The root problem is anchored in the famous prohibition of *riba*, translated variably as interest or usury, which offers the more spectacular side of unease between the classical and the modern traditions. Once *riba* is defined as "interest," any modern banking transaction runs the risk of contravening Qur'anic prescriptions, and undermining the

139. From Ibrahim Warde, *Islamic Finance in the Global Economy* (forthcoming 2000), quote from chapter one, section ii of the manuscript ("about statistics and performance assessments"). This promises to be the definitive critical study on Islamic banking and finance.

very basis of modern banking. A second problem is related to the structure of a limited company in the form of a bank, and the difficulties resulting from banking transactions which this company is destined to carry out or facilitate.

It is in this context that both private institutions and governments have been grappling with the Islamic prohibition of *riba*. The prohibition of *riba* still dominates the entire field, and is illustrated in a seminal 1992 decision of the Pakistan Federal Shariat court.¹⁴⁰ On that occasion, which was understandably crucial for the whole economic system of a country priding its *raison d'être* on the "purest" respect of the *shari'a*, a questionnaire was circulated by the court "to distinguished 'ulama, scholars, economists and bankers of the country and abroad." (§18) It consisted of some sixteen questions, re-grouped under thirteen headings:

1. What is the definition of Riba according to the Holy Qur'an and Sunnah of the Holy Prophet (p.b.u.h.). Does it cover the simple and compound interest existing in the present day financial transactions?
2. If banking is based on interest-free transactions, what would be its basic practical shape in conformity with the Injunctions of Islam?
3. (i) Does the interest on loans floated by the Government to meet national requirements Riba?
(ii) What alternatives can be suggested for the banks in case they grant loans without interest for various requirements?
4. Can, in the light of the Injunctions of Islam, any differentiation be made between private and public banking in respect of charging of interest on banking facilities for various services rendered?
5. (i) Can the capital, according to the Injunctions of Islam, be regarded as an agent of production thus requiring remuneration for its use?
(ii) Does devaluation of the currency affect the payment of loans taken before such devaluation?
(iii) Can inflation causing rise in the cost/value of gold and consumer goods in term of currency have any effect on the sum borrowed?
6. What would be the alternatives in the context of present day economic conditions to carry on domestic and foreign

140. *Mahmood-ur-Rahman Faisal v. Secretary, Ministry of Law*, PLD 1992 FSC 1, also published as a separate book, Federal Shariat Court judgment on interest (*riba*), Lahore 1992, including the decision (pp.1-188) and Appendices (pp.1-159). The decision is hereinquoted following its division in paragraphs.

trade efficiently without availing of banking facilities based on interest?

7. Is interest permissible or other wise on the transactions between two Muslim States or a Muslim and non-Muslim State?

8. Is it possible to carry on insurance business otherwise than on the basis of interest?

9. Does interest accruing to the Provident Fund come under Riba?

10. Can the payment of prize money on Prize Bond of Saving Bank Account or other similar Schemes be regarded as Riba?

11. Would it be lawful under Islamic Law to differentiate between business loans on which interest may be charged and consumption loans which should be free of interest?

12. If interest is fully abolished, what would be the inducements in an Islamic Economic System to provide incentives for saving and for economising the use of capital?

13. Can an Islamic State impose any tax on its subjects other than Zakat and Ushr?

The answers to the questionnaire were reproduced in a full book-length appendix of some 143 pages,¹⁴¹ and were extensively used by the court itself to consider un-Islamic no less than twenty major Pakistani statutes, ranging from the Interest Act of 1839 to the Banking Ordinance of 1979. It is no surprise that the decision was frozen on appeal as it put in jeopardy a large number of legislative acts and risked undermining the whole banking system. Nor was this measure totally surprising in view of the fact that one of the strongest advocates of full Islamization, the late General Zia-ul-Haq, had himself agreed to postpone the overhauling of the financial system several times. As the Court explained, "the question of interest was to remain outside the jurisdiction of the Federal Shari'at Court up to 25th June, 1983. . . [T]he bar [was] to continue till 25th June, 1990. The said period having expired the bar stood removed and the jurisdiction with regard to examining any provision of any fiscal law or any law relating to the levy and collection of taxes and fees or banking, insurance practice and procedure now vests in this Court." (§63)

The long court decision, written by Chief Justice Dr. Tanzil-ul-Rahman, did not strictly follow, or answer, all the questions it raised with the various experts. But the decision was premised throughout on a strict understanding of the prohibition of *riba* as equivalent to the prohibition of interest in whatever forms it may manifest itself.

141. *Id.*, Appendix A, 1-143.

The reasoning proceeds in several phases: it starts with an explanation of the stakes in the case, the procedure of the Court including the call for expert witnesses and the aforementioned questionnaire, and the history of the prohibition of *riba* in principle since the 1956 Constitution of Pakistan through to the final empowerment of the Federal Shariat Court to review the matter in June 1990.

Next is examined the definition of *riba* (§65 ff.). There is little original in the long section.¹⁴² The Court covers the instances in which the word appears in the Qur'an and in the hadith, noting however that "*riba al-fadl* is outside the scope of the present discussion." (§71) The exposé culminates in the rejection of the alleged distinction between interest in consumer transactions, for which *riba* would be strictly forbidden, and interest in productive loans, where it could be tolerated: "[W]hen the Holy Qur'an prohibited interest, it applied to the interest on commercial loans for productive purposes as well as to the interest on consumptional loans." (§45)

Examining further the issue of *riba*, the Court went through various techniques associated with the interpretation of Islamic law, including the consideration of consensus (*ijma'*, §125 ff) and "weal," (*maslaha*, §140 ff). It concluded on the latter that "the rule of *Maslaha* can't be invoked in aid to permissibility of 'Bank Interest'" (§152), and on the former that:

§137. As it has been explained in the earlier part of the judgment there are two types of *Riba* : (1) *Riba al-Nasiah* and (2) *Riba al-Fadal*. Presently in these petitions we are concerned with *Riba al-Nasiah* i.e., the interest charged on the money lent or in other words the addition over and above the principal sum advanced on loan. It includes all kinds of interest irrespective of the fact whether the rate stipulated is high or low and whether the interest is or is not added to the principal sum after fixed periods and whether the sum lent is for production or consumption purposes. So far this kind of *Riba* is concerned we have not come across any difference of opinion regarding its prohibition. There is no Commentator of the Holy Qur'an, no narrator of *Ahadith*, and no Jurist of Islamic *Fiqh* worth the name who has even expressed or even mentioned any doubt regarding any obscurity or ambiguity in its meaning. The difference of opinion whatever is found is regarding '*Riba al-fadal*' and that is out of discussion in the context of Bank interest which is under our consideration.

142. On the discussion of *riba*, Warde, *supra* n. 139, at chapter 3; Abdullah Saeed, *Islamic Banking and Interest: a Study of the Prohibition of Riba and its Contemporary Interpretation* (1997), Nabil Saleh, *Unlawful Gain and Legitimate Profit in Islamic Law* (1986, 2nd ed. 1992); and the two articles mentioned *supra* n. 33.

The most interesting section in the decision concerns the two last items which the Court discussed before proceeding with the invalidation of the Pakistani statutes concerned by the prohibition of interest. One argument which it gave particular attention to was inflation and/or indexation as a possible exception to the strict application of the *riba* rule. If money depreciates, according to those tenants of a lenient view of banking which the court opposes, or if, alternatively, indexation is possible by contract or by state regulation, then why should the value of the money lent, rather than the fixed quantity, not be taken into account?

Several legal and policy matters are examined to refute the argument, most prominently the need to avoid manifest injustice by allowing creditors to be abused by debtors if they are paid back with the original amount of money in the loan, while repayment is worth several times less in real value. In answer to that argument, the Court resorted to general principles of tort law, including the principle that "the usurper will not be required to indemnify the loss caused to the value of the property or money as a result of a fall in its price." (§196), and to more general principles of equity ("an evil . . . should not be redressed by a similar or a bigger evil," §176) and policy considerations:¹⁴³ "Why should a lender be protected against inflation while the borrower is not similarly protected against deflation?"¹⁴⁴

In the rich, albeit sometimes repetitive, argumentation, the most interesting passages occur when the Court is at odds with recent Pakistani case-law:

§231 For the above discussion, we would approve the three decisions reported as *Messrs Bank of Oman Ltd. v. Messrs East Trading Co. Ltd. and others*, *Irshad H. Khan v. Mrs. Parveen Ajaz and Habib Bank Ltd. v. Muhammad Hussain and others* (P L D 1987 Kar. 404, 466 and 612) and respectfully dissent with the above-cited judgment reported as *Aijaz Haroon v. Imam Durrani* (P L D 1989 Kar.304) as also adopted by the learned Judge in *Tyeb v. Messr Alph Insurance Co. Ltd. and others* (1990 C L C 428) to the extent of allowing an additional amount on loan based on indexation on account of inflation.

The views of Justice Wajihuddin Ahmed, the author of *Tyeb v. Messr Alph Insurance Co. Ltd. and others*, are the object of the Federal Shariat Court detailed rejection. In his decision, the Karachi

143. Even though it asserts the prevalence of Islamic law over any economic theories: "The arguments given in support of indexation are mostly based on some economic principles and do not relate to Shari'ah." (*Mahmood-ur-Rahman*, §177).

144. *Id.*, §228, quoting an article by Munawar Iqbal, presented at a seminar held in Pakistan in 1987.

judge relied on the 19th century treatise of the Hanafi jurist Ibn 'Abidin, who appears to argue the need to repay the lender with "the real worth of the currency, which was the subject-matter of or for which the contract was concluded."¹⁴⁵

The original text of the Levantine Ibn 'Abidin is not without a dose of uncertainty, which the great 19th century jurist acknowledges in an attempt, at the end of his short treatise, to find a middle way between a buyer and a seller who agree on a currency worth less when payment is due than its real value at the time of the contract.¹⁴⁶ All the arguments in between the acknowledgment of inflation and the danger on the certainty of contracts, together with a detour into the habits of merchants, can be found in that treatise. They were reflected in the opposing views of the Pakistani courts.

* * *

Many of the problems associated with Islamic banks have been announced—though hardly solved—in the Federal Shariat Court decision. Meanwhile, the number of private Islamic banks has increased dramatically over two decades, and their assets are real. Even western banks operating in the Middle East have quickly re-adjusted with the establishment of "Islamic portfolios."

Islamic banks have mushroomed in the past twenty years, but the picture is still patchy. In some cases, as in some such enterprises in Egypt, failure has befallen the bank and given rise to the intervention of the government to offer protection to the small depositors.¹⁴⁷

In other countries, more success has been forthcoming, although the essential operations of the banks have tended to be directed towards short-term financing of international trading.

For private institutions (and individuals), the challenge is to set up a system of banking which does not acknowledge any form of fixed fee on any transaction. A deposit or a loan of, say, 9% yield per annum would be illegal. To replace it, and yet to retain the basic function of banking, the alternative generally proposed is for a financial institution to pay its depositors with a share of its annual profit in a way which is akin to a distribution of dividends to the shareholders of a company. Under that 'first-tier' of the *mudaraba* contract (the Roman *commenda*, known also as "partnership for profit and loss"), the depositors would in effect be shareholders, and the return on the money deposited with the bank will not be previously fixed, so as to prevent the deposit from being tainted with the illegal *riba*. Simi-

145. Cited §59 in the original decision, reproduced in *Mahmood-ur-Rahman*, §210.

146. Ibn 'Abidin, *Majmu'at rasa'el* (collected treatises), 2 vols, Beirut n.d., ii, 57-67.

147. On the experience of the so-called *sharikat tawzif al-amwal* ('Islamic' investment companies) in Egypt, see Warde, *supra* n. 139, at chapter 4 section 4, "new forms of Islamic finance," and literature cited.

larly, in the loan extended by the bank to borrowers, the profit of the bank would be function of the success of the project. The bank would enter in a contract of *mudaraba* with the borrower-entrepreneur, and would share in the success or failure of the project for which funds were extended. Thus the concept of a "two-tier *mudaraba*."¹⁴⁸

The *mudaraba* is the prime vehicle under which the theoreticians of Islamic banks, following the Egyptian mufti Muhammad 'Abduh at the turn of the century,¹⁴⁹ through to Muhammad Baqer al-Sadr in 1969,¹⁵⁰ see the basic relationship in an Islamic bank between depositors, the borrowers and the bank.

The organization of a dual system of *mudaraba* contracts as a basic model for the Islamic bank appears straight enough under this scheme.¹⁵¹ Things are not so simple, however, and one of the basic difficulties at the confluence of Islamic and contemporary banking is the idea of the bank itself. The reason why Islamic banking has been so unpalatable to the western model is precisely because a depositor in the Islamic scheme is normally not entitled to receive a return on his deposit whilst protecting his capital—his initial deposit. A loss incurred by the bank will eat up the depositor's capital, the mere existence of which cannot be guaranteed under the scheme of *mudaraba*. In addition to the complication of a classical Islamic system in which "the concept of corporate existence" was not available, the agent in the traditional contractual arrangement, "was not liable for any part of the investment in case of loss."¹⁵² Since that agent in the classical contract is none other than the bank in a modern Islamic set-up, the initial worries of the governor of the Bank of England, who rejected the mere idea of an Islamic "bank" in Britain are understandable.¹⁵³ In another early appreciation of the basics in the sys-

148. Frank Vogel & Samuel Hayes, *Islamic Law and Finance. Religion, Risk and Return* 130-31 (1998): "A first-tier *mudaraba* is created when investors (we shall call them 'depositors') place their capital with an Islamic bank, fund, or other financial institution, which here acts as the *mudarib* or working partner. The financial institution or *mudarib* in turn invests these funds with entrepreneurs (the equivalent of a conventional bank's borrowers) by means of second-tier *mudarabas*, in which the Islamic financial institution now has the role of capital investor. . . . The institution's profits then come not from interest income but from a percentage of the profits from the second-tier *mudarabas*."

149. On which, Mallat, "The debate on *riba*," 69-74.

150. Cited supra n. 58. The banking contributions of Sadr are discussed in Mallat, *The Renewal* at 169-87.

151. This 'two-tier *mudaraba* system' is the dominant alternative scheme in theory. One should note, however, that a more elaborate system was presented by Muhammad Baqer al-Sadr in his early treatise on the Islamic-free bank. Sadr suggests a one-tier system in which the depositor and the entrepreneur would be the two parties to the contract, with the bank acting only as intermediary. See my discussion in *The Renewal*, at 169-73.

152. Udovitch, supra n. 136, at 239, citing several authorities.

153. For Robin Leigh-Pemberton, then governor of the Bank of England, Islamic banking is "a perfectly acceptable mode of investment, but it does not fall within the long established and well understood definition of what constitutes banking in this

tem, an American regulatory official had clearly shown the limitations of the system under U.S. law: "The principle of operating as a partner, in which profits and losses of enterprises are shared, appears sufficiently at odds with U.S. practice and regulations as to make it unlikely that the Islamic financial institutions can operate here as commercial banks or thrift institutions. In addition, the prohibition of interest, while itself occasioning little or no regulatory objection, would appear to represent a substantial competitive disadvantage for such institutions."¹⁵⁴

On the practical level, another significant problem arises from the marginal place of *mudaraba* in self-styled Islamic banks. Under the most optimistic accounts, *mudaraba* schemes represent less than 10% of banking operations.¹⁵⁵ Instead, the main vehicle or "product" of Islamic banks is the so-called *murabaha*, which is none other than a facilitation by the bank of short-term loans, mostly in commercial export-import operations, for their most trusted clients.¹⁵⁶ While various exotic appellations are labelled unto a basic scheme facilitating short-term sale, the legal vehicle is hardly original, or revolutionary. More seriously, for a financial system that prides itself on offering "full" banking facilities from an Islamic perspective, it does not correspond to any particularly original scheme.

Finally, and on the level of governments, some countries have attempted to cleanse the macro-economic banking system from *riba*. *Riba*-free legislation was passed, but the picture is also uncertain, especially with regard to the fact that the whole banking system is often under public ownership control. The still unimplemented decision of the Pakistan Federal Shariat Court shows the difficulty facing any modern Middle Eastern legislation in that central economic field.¹⁵⁷

country." Speech given at the Arab Bankers Association, London, 2 October 1984. The only 'Islamic bank' allowed for a while in Britain was eventually shut down.

154. Charles Schotta, "Islamic banking and the U.S. regulatory climate," in *Proceedings, Islamic banking and finance conference*, Washington DC, 25-26 September 1986, 1. Schotta was featured as 'deputy assistant secretary of the treasury for Arabian Peninsula affairs.'

155. E.g., Vogel & Hayes, *supra* n. 148, at 135.

156. "Mark-up' transactions account for 80 to 95% of all investments by Islamic financial institutions. The best-known mark-up instrument is the *murabaha*, a cost-plus contract in which a client wishing to purchase equipment or goods requests the financial provider to purchase the items and sell them to him at cost plus a declared profit. It is thus a financing-cum-sale transaction: the bank purchases the required goods directly and sells them on the basis of a fixed mark-up profit, agreeing to defer the receipt of the value of the goods (although the goods can be delivered immediately)." Warde, *supra* n. 139, chapter 7 section 1, "*Murabaha* and other mark-up schemes."

157. For an excellent survey of the various countries, Warde, *supra* n. 139, at chapters 3-6; for the regulatory challenges under the new 'global' system of banking, see chapters 7-11.

Islamic banking is a recent phenomenon, which indicates the importance of the *shari'a* in the most basic set-up of the banking system in the private as well as public sectors. Although the experiment is not developed enough for an assessment of its durability, it is fair to say that it has countered western banking with an unusual intellectual challenge. In the overall commercial field however, the ultimate dominance of western-style law still prevails, despite what a rich—though patchy—Islamic tradition of classical commercial law seems to offer.

ARBITRATION

If Islamic banking is to be partly perceived as the revenge of classical law from the point of view of substance, another form of the tradition's revenge may be taking place, procedurally, in arbitration. Here, the object of the revenge may have focused more on the state and the slowness of its judicial system than on the revival of classical concepts.

This is an area which is obviously not confined to commercial cases, but the interest in arbitration has been primarily one of commercial lawyers in the past few years, and institutional anchors on a national and regional level are primarily sought by merchant and law practitioners.

An appreciation of the arbitration process in the Arab world requires a return to basics. The basics here are Weberian: it is the state which has the exclusive right to exercise coercion, including violence. It is judicial power which wields, through the rule of law, the most sophisticated manifestation of state coercion. There is no rule of law without state monopoly of violence.

This stands in sharp contrast with the philosophy of arbitration, which is a consensual process by nature, at all levels of the process. The arbitration process does not in theory require coercion. By submitting to it rather than to the judge, the parties accept in principle the result of the award. Here, however, matters become in a Middle Eastern Arab context particularly complicated, and the whole Weberian theory comes back to the fore with a vengeance. Arbitration remains an exception, in the settlement of intractable disputes, to the judicial process, and does not operate outside the framework of reference imposed by the main rule, which is judge-made decisions.

Weber's conclusions on state coercion offer the general background to the first part of our proposition in this epilogue on commercial law: so long as the judicial process in the Arab world does not rise up to the extent needed to justify state monopoly over violence, its *ersatz* in the form of arbitration will remain faulty. This is true for domestic as well as international arbitration, of which the commercial dimension is the most important.

The second part of the proposition is that the flight into arbitration will remain, despite all its shortcomings, the haven of merchants in search for a speedy settlement.

Why do commercial litigants resort to arbitration rather than courts? The simple answer is their wish to avoid the judicial system. Reasons may vary: the process in court may be too slow, too unpredictable, too open, too unreliable, or too expensive.

Too slow: recourse to arbitration is the way to ensure, in theory, higher speed, as the informality of the arbitration procedure and the availability of the arbitrators appears to be far superior than any court would be able to sustain.

Too unpredictable: arbitration may offer better predictability, or some more insurance or comfort for the parties, who are able to choose, rather than the unknown judge, at least one arbitrator to each party's liking. Presumably the parties choose persons of higher integrity and dedication than might be forced upon them by a wobbly judicial system.

Too open: the arbitral process' closed or half-closed doors ensure improved discretion, which is particularly useful for business transactions. The award normally remains the property of the two parties, who might wish to keep it out of the public eye, for reasons connected or not with taxation or their preference to keep a low profile in business on litigation issues.

Too unreliable: arbitration may offer, in terms of control over the process, increased reliability, which dovetails with speed and predictability. Arbitration is a one-instance process, whereas the three-stages of normal procedure, all the way to the supreme court, would suggest decisions which are overturned, quashed or weakened by dissent at various levels.

Too expensive: arbitration can result in lesser costs for the litigants. Whilst sometimes prohibitive in international chambers of commerce for Middle Eastern litigants, costs tend to compare well in relative terms. A national or regional arbitral tribunal would normally be cheaper to go to than the protracted process of local courts, and parties might dispose of lawyers altogether. While lawyers are usually needed in the arbitration of big commercial cases, the time factor of a quicker process brings overall costs down.¹⁵⁸

Each of these reasons, which are universal, applies more or less accurately in the Arab world, where the reliability of justice suggests contradictory manifestations of the rule of law. In a region which has

158. For the marshalling of these basic arguments on the virtues of arbitration in a Middle Eastern context, see the explanatory memorandum (*mudhakkara idahiyya*) of the new Kuwaiti law on arbitration, Law 11, 1995, e.g., in *al-Majalla al-lubnaniyya lil-tahkim al-'arabi wal-dawli* (The Lebanese Review of Arab and International Arbitration), 1:1, 135-37 (1996).

been submitted to repeated and violent turmoil in the twentieth century, however, economic transactions (especially international transactions) have tended to be more equitably upheld than human rights law, the penal process or environmental grievances, both as a business ethics and as the subject of adjudication by the courts. This is not to say that the lack of authority of the courts in the constitutional field did not affect the less controversial arena of commercial law: the general system of patronage is rampant in the region.

For all these reasons, the region has watched in the past decades a flight away from judicial adjudication and the consequent rise of arbitration. Arbitration has found great favour domestically and regionally, as it appears to offer obvious speed and simplicity in comparison with the uncertain and costly court system. As law merchant, however, it is plagued at all levels by the diffidence of the judiciary. This diffidence must be understood against the frustrated background of judicial office in most of the Middle East.

Judges suffer in the region from a combination of executive meddling, overwork, and low salaries. As a result, the judge, who should in theory be relieved by the advent of arbitrators to take some of his or her work off their plate, finds a glittering chunk of commercial law, typically involving commercial transactions with a large monetary significance, being diverted to wealthy lawyers, or worse, to retired or former judges. When some of the fees of the arbitrators are known, and the most basic comparison conjured up in the judge's mind with his own fixed remuneration, the result can only be diffidence.

So unless the salaries of judges are increased to measure up with those an arbitrator of commercial transactions, the result is what we have in the region: an increased interest in arbitration, especially in commercial circles, to avoid the courts, and a proportionate and rising diffidence from judges. This is compounded by the state's natural propensity to frown upon matters of importance which would be adjudicated outside its control, and threaten its natural Weberian monopoly of power.

How is this diffidence illustrated in the legislation and court cases of the Arab Middle East?

LEGISLATION

Ever since the famous Aramco award, which pitted the government of Saudi Arabia against the American oil company,¹⁵⁹ one lesson was

159. The proceedings of the Aramco case leading to the award against Saudi Arabia were published in ten volumes, *Arbitration between Government of Saudi Arabia and Arabian American Oil Company*, n.p., 1956. The award upheld Aramco's position against the Saudi government by confirming the rights of the company to the exclusive transportation of Saudi oil protected in accordance with both Saudi and international law.

learnt by the wealthiest government in the Arab world: any administrative contract, that is a contract involving the state or one of its branches, will not, by law, include an arbitration clause without express permission from the Council of Ministers.¹⁶⁰ Considering the importance of construction and other public contracts in the Kingdom, this brings arbitration outside the pale of the most significant commercial transactions.

Whilst the Saudi case may be extreme, legislation tends to create all kinds of typically procedural problems to arbitration. This is either done for special contracts of some commercial significance, like those related to agency and distribution, or in a more general manner.

We have already discussed agency as a special area of commercial law, which dominated the rules and patterns of trade, and has led to special legislation designed to protect local importers by means of judicial compensation, in case of non-renewal of the contract, and administrative constraints to the appointment of a new agent by a foreign manufacturer.

Within commercial agency law, the exceptional – or excessive – rules are reinforced procedurally, to avoid the drafting of agreements which bypass the restrictive legislation.

Lebanon, which introduced the paragon commercial agency statute in the Arab world under Decree Law 34/67, has also ensured that arbitration is kept at bay from adjudicating agency disputes:

Notwithstanding any agreement to the contrary, the courts of the place of business of the commercial representative shall be deemed to be competent to consider any disputes arising from the commercial representation contract.¹⁶¹

It was left to commentators to try wiggling out of the public order clause by suggesting that arbitration could be initiated in Lebanon *after* the dispute had arisen.¹⁶² This public policy dimension, which is clearly averse to arbitration superseding the Lebanese law of commercial agency, has travelled in one way or the other to the Gulf along with the initial statute. In the Gulf, an arbitration arrangement can hardly be effective, in case of breach, when the administra-

160. Decree 58 of 25 June 1963, discussed e.g., in A. Ahdab, *Arbitration in the Arab Countries* 602 (1990). Also Statute on Arbitration, Royal Decree M/46 of 12.07.1403 H., corresponding 25 April 1983, Art. 3: "Government agencies are not allowed to resort to arbitration for settlement of their disputes with third parties except after having obtained the consent of the president of the Council of Ministers," and Implementation Rules, decree of the Council of Ministers 71, 2021/11, 8 September 1405, corresponding 27 May 1985, Art. 8: "Where a government agency is a party to a dispute which it deems appropriate to refer to arbitration, [it must draft a memorandum which] must be approved by the president of the Council of Ministers."

161. Art. 5, D-L 34/67.

162. See e.g., Saleh, *supra* n. 81, at 3-39 to 3-41.

tive agencies themselves (typically the Minister of economy), are entitled to stop a new importer/dealer/agent from carrying out the agency so long as the conflict pending between the former agent and the foreign principal has not been settled. Whether rejected openly by legislation or hampered by administrative means, the uselessness in Lebanon of an arbitration clause in the initial agency contract is true of Bahrain, the UAE, Jordan, and Oman. The list is not comprehensive. As illustrated in a recent decision of the Court of cassation in Kuwait allowing an arbitration clause to stand, against an opposite conclusion in a similar case by the Lebanese court of appeal, the situation of 'international arbitration and public order' is in a state of flux.¹⁶³

There is another, more general, form of adversity to commercial arbitration in national systems, especially when arbitration espouses an international form. This takes the shape of the difficulty to enforce an arbitration award, whether a domestic or an international one, in an Arab jurisdiction. Various agreements and treaties, including the Amman convention of 1987, or the New York convention of 1958, to which several jurisdictions have adhered, have tried to circumvent the problem on paper.

Invariably, these treaties are undermined by 'public policy' considerations which the courts are all too prone to implement, and which the party that is dissatisfied with the award can put forward. There are various ways to do that, which are usually premised on public policy considerations, due process, the compulsory personal presence of both parties before the judges, and other constraining devices. These essentially procedural devices end up with the conflict carefully perused, if not effectively re-tried, by the local jurisdiction.

In addition, there is a long string of statutes setting aside arbitration awards granted internationally, by freezing them, subjecting them to various appeals, or simply ignoring them. Some of the most recent such legislation can be found in Algeria,¹⁶⁴ the UAE,¹⁶⁵ Kuwait,¹⁶⁶ Egypt,¹⁶⁷ and Tunisia.¹⁶⁸ The pattern of restrictions is clear.

163. The Kuwaiti decision is dated 6 february 1999, and is unreported. It allowed the arbitration clause between a foreign airfreight company and a local agent to stand, despite the fact that the arbitration was to be held in Beirut, not in Kuwait. In contrast, one Lebanese court of appeal rejected the application of an arbitration clause between a foreign company and its agent in Lebanon, ruling that the Lebanese courts were competent to adjudicate such disputes under the doctrine of public order, decision of 2 february 1999, reported in the daily *al-Diyar*, 23 may 1999, 24.

164. Legislative decree no. 93/09 of 25 april 1993, section iii, included in the civil code under Arts. 442 and 458 bis, (limitations under new Art. 442 of matters generally under public policy, and matters of 'legal persons governed by public law', general limitations under 458 bis.) Text in MECLR, 1, 1995, 33-36 (in English).

165. Arts. 203-218 of the Federal Law of Civil Procedure, e.g., Art. 235 considering the enforcement of foreign judgments and awards possible if "state courts have no jurisdiction in the dispute." See the strict application in a decision reported in

CASE LAW

Statutes are not the only problem. Two comments on UAE and Omani practice show some of the problems facing the enforcement of foreign arbitration awards by the local courts:

The UAE court [before which enforcement of the arbitral award is sought] will still review the process of serving summons and notifying the party, especially if the arbitration award is challenged by the opponent party when an application is made to uphold the arbitration award by the UAE court. Further, a recent judgment delivered in the appeal of *Indian Overseas Bank v. Ibrahim al Shirawi* and others by the Dubai Court of Cassation is a matter relating to enforcement of a foreign judgment has thrown considerable doubt on whether a foreign arbitration award will be enforceable in the UAE.¹⁶⁹

This is also true in Saudi Arabia, where foreign judgments are frowned upon and tend to be set aside by courts.¹⁷⁰ In a similar vein, a British barrister who has practised in Oman noted how "the status of foreign arbitral awards in Oman has been unclear, and, since the commercial judicature was constituted in its current form, more than ten years ago, there has been no case where direct enforcement of a foreign arbitral award has been granted."¹⁷¹

A 1990 Court of Cassation case in Jordan will also serve as an illustration, *a contrario*, of jurisdictional diffidence to arbitration,

MELCR 1:2, 1995, 73-4 and in *Indian Overseas Bank v. Ibrahim Mohammed al-Shirawi*, Cassation 117/1993 dated 20 november 1993, see *infra* n. 167. But see *contra* the upholding of a foreign arbitration clause, *Basamah Marketing Establishment v. Aldaulia Marketing*, Cassation 61/94, discussed in R. Price, *supra* n. *Yearbook of Islamic and Middle Eastern Law* ii (1995), at 207-08.

166. Law 11, 1995, making the whole process of the arbitration tribunal particularly complicated, despite arguments to the contrary by the aforementioned Explanatory Memorandum and the presentation by the representative of the Ministry of Justice in the proceedings of the Beirut Euro-arbitration seminar, December 1996, published as Muhammad Naser Nasrallah, "*Tarikh al-tahkim bi-dawlat al-Kuwait wa anwa'uh* (history and types of arbitration in the state of Kuwait)," *al-Majalla al-lubnaniyya lil-tahkim al-'arabi wal-dawli*, 3, 1996, 22-28 at 25-26.

167. Law 27, 1994, vide Art. 58 on the inquisitive role of the courts as to parties and public policy. Text in in English in *Yearbook of Islamic and Middle Eastern Law* i, (1994), 500-17; in Arabic e.g., in *al-Majalla al-lubnaniyya lil-tahkim al-'arabi wal-dawli*, 1:1, 1995, 127-32.

168. Law 42, 1993, vide Art. 81. Arabic text e.g., in *al-Majalla al-lubnaniyya lil-tahkim*, 1:1, 1996, 142-51 (But note the restriction of public policy to the concept understood "under private international law").

169. Esam al-Temimi's comment on *Indian Overseas Bank v. Ibrahim Mohammed al-Shirawi*, cited *supra* n. 165, in MECLR, 3, 1996, 85; also discussed in Price, *supra* n. 22, at 330.

170. Judgment of Diwan al-Mazalim reproduced in Lewis Ruttley & Mallat, *supra* n. 108, at 304-21.

171. Alastair Hirst, "Court decisions on commercial arbitration in the Sultanate of Oman," MECLR, 2, 1995, 77-79, at 77.

even in internal matters. In that decision, the highest Jordanian Court confirmed the Court of Appeal's decision to reverse the Court of first instance in a case of arbitration between the municipality of the city of Basira and a public works company. The company had undertaken the building of a road which was not deemed conform to the specifications of the original contract. When the conflict arose in 1981 on the fulfilment of contractual specifications, the two parties concluded an arbitration agreement, which resulted in 1986 in an award in favour of the municipality. The award was attacked before the court of first instance on several grounds, notably for lack of competence of the head of the municipality in entering into an arbitration process, and, subsidiarily, because the arbitrators had overstepped the role given to them in the arbitration agreement. The Court of Cassation refused to be drawn into matters of fact which it considered lower judges solely competent to look into, and upheld the Court of Appeal's decision. By a majority of two (out of three), it held on the second argument that "the court of appeal as court of fact, and following its competence in assessing evidence according to Articles 1/33 and 1/34 of the law of evidence, had concluded that the Council of the city of Basira had agreed to arbitration." It further held that the Arbitration law of 1953 prevents the court from undermining an arbitral award except in specific and narrow cases, as when "the award had been issued on the basis of a void arbitral agreement, or if the award had overstepped the time limit specified in the agreement, or if the award had fallen outside the limits of the agreement." This assessment, the majority concluded, was a prerogative of the court of appeal as court of fact.¹⁷²

The dissenting judge approved this last conclusion, but considered that the head of the Basira municipality did not have the right, in view of the Jordanian civil law and the law of municipalities, to enter into an arbitration agreement without an express authorisation from the municipality's Council.¹⁷³

One can see the resistance to a clear law, on a matter of domestic arbitration, both in the first instance court and from the dissenting judge. Of note, however, is the most important element in the process: time. Whilst the conflict arose in 1981, it took five years for an award to be granted, and a further four years to reach final approval in the judicial system. All five elements mentioned at the outset of this section were defeated, and Weberian monopoly of law and power returned, in the process, to the state through its judges.

172. *Al-Mamlaka al-urduniyya al-hashimiyya* (the Hashemite Kingdom of Jordan), *Mahkamat al-tamyiz* (court of cassation), 8 march 1990, MAFQ 12, 1992, 197-200, at 199.

173. *Id.* at 200.

Another documented example from Jordan illustrates the time and speed factor involved in challenges to the arbitral award. In that case, the Court of Cassation had to streamline a procedurally complicated issue which arose from the stay of bankruptcy proceedings by a lower court after the decision by an arbitrator to dissolve a partnership. Two partners had started the original suit in 1977 against their fellow partner, and they asked the court to appoint a guardian of the partnership, which it did. But the three partners came to an agreement in court for the amicable dissolution of the partnership under the supervision of an arbitrator, who duly took on his task, and attached some of the land belonging to one of the plaintiffs to cover the liabilities of the partnership. A decision to stay the attachment proceedings was granted, leading to the freezing of the whole dissolution process, with, as a result, the dragging on of the liquidation process for a decade. After various cross-appeals, the Court of Cassation brought some order into the process, explaining that the arbitration issue had been long decided upon by the courts, which had confirmed the liabilities of each of the parties in the partnership. The original plaintiff had therefore no business undermining the decision of the arbitrator, which had been confirmed by the Court, and the arbitrator's task was to continue unimpeded until full settlement of all the liabilities.¹⁷⁴

Here also, the dilatory procedural manoeuvres of the party dissatisfied with the arbitration are clear, and the extensive time needed for the Court to force the implementation of the award clearly defeats the primary purpose of the arbitral effort: speed. In the past few years, most jurisdictions in the Middle East have witnessed the difficult but dogged efforts of those interested in the arbitration process.

Considering the bottlenecks in legislation and case law, one is entitled to some scepticism on the future of effective arbitration. The proliferation of legislation, protocols, arbitration courts and centres, all vying to a place in the sun, if not supremacy, in the Arab world, may be more a sign of weakness than of strength. The absence of any serious reported arbitration in Rabat, despite a genuine attempt in the Amman convention of 1987 to set it up as a major and supreme center for arbitral awards, is one example of this pervasive reluctance. The move of the Court from Rabat to Cairo in 1994 may be the beginning of a different, perhaps more successful, re-centring. The structural problems remain, for court practice is not encouraging. Both the state generally and the judge, in particular, will try to reclaim control over the arbitral process.

One way to avoid the shortcomings of arbitration includes the "new" field of alternative dispute resolution (ADR). The difference

174. Al-Mamlaka al-urduniyya al-hashimiyya (the Hashemite Kingdom of Jordan), Mahkamah al-tamyiz (court of cassation), 29 august 1992, MAFQ 16, 1994, 301.

with arbitration is well known: the person who presides over an ADR procedure will not issue an award. His or her goal is an agreement between the parties in conflict. This is the only way to avoid the pitfalls of implementation, since the parties who have just agreed on a compromise will also want it to be effective. There is no loser in ADR. Such an agreement being naturally binding, the whole dimension of the judicial or arbitral process is left behind.

But then, is there a legal process at all? In theory, such resolution as may obtain in ADR is nothing else but the good old gentlemen's agreement. In practice, a combination of ADR, arbitration and judicial process might offer ways out of the present deadlock between judges and arbitrators in the Arab world.

For lawyers in daily practice, the situation is the more dramatic since the Catch-22 situation imposes business rhythms which make of arbitration a dramatic need, helping to avoid the long and painful route imposed by the judicial process. But arbitration is constantly undermined: whilst the idea of pushing the arbitral process forward seems naturally compelling, it is difficult to imagine either state or judge getting enthusiastic about it.

The more serious way out would be to bolster the judiciary. The more effective and comfortable the judiciary, the more a natural ally for the arbitrators, who take a lot of weight off the judges' back. But for arbitration to find a place in the sun, the financial and social imbalance cannot remain as dramatic as it is today. Frustrated judges will not readily give precedence to successful arbitrators. This is true for commercial arbitration, but no less true for any sort of informal process for the settlement of disputes.

CONCLUSION: ON THE UNIVERSALITY OF THE LAW MERCHANT

Commercial law is a field with the greatest propensity to elude synthesis. This is because the law of merchants is intrinsically attached, if it wishes to be successful, to the day-to-day practice of its strongest bearers and defenders, the merchants themselves. In a famous dictum of Lord Mansfield, the universality of law merchant was asserted in a case of admiralty: "The maritime law is not the law of a particular country but the general law of nations: 'non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes et omni tempore, una eadem lex obtinebit'."¹⁷⁵

175. *Luke v. Lyde*, 97 Eng. Rep. 787 (1759), at 617: "It will not be the law of Rome, or the law of Athens; not one law now, one law hereafter; but one and the same law, for all people and for all times." Quoted in my "Un comparatiste anglais au XVIIIème siècle. Influences françaises sur la common law dans l'oeuvre de Lord Mansfield," *Revue Historique de Droit Français et Etranger*, 72, 1994, 383-400, at 392; and in conclusion to Roy Goode, *Commercial Law* 1212 (1995).

If the dictum is true, at some abstract level, for all law as interpreted and adjudicated by human beings, as in the original passage which Lord Mansfield borrowed from a reflection by Cicero on public law,¹⁷⁶ the universality of law merchant is particularly true in an epoch of unprecedented globalisation of trade. While generalising models are possible at different times in history, and a model of trade practices as jelled into law detectable from Babylonian times, through to the classical age of Islam, the emergence of capitalist Europe, and the establishment of the World Trade Organisation, some dilemmas have remained, as exciting and responseless as they were from the outset: the question of interest, excessive or otherwise, is one example. Another is the search for rapid solutions in business, through the court system, and if it fails, through a process of arbitration. A third is a characteristic “dilemma of liability: the dilemma which most persistently launches judges into speculation on the meaning of corporate entity is related to the liability of corporate members for obligations—contractual or tortious—that arise from corporate activities. This is the question that springs first to most lawyers’ minds when ‘corporate entity’ is mentioned.”¹⁷⁷

For the lawyer indeed, geared as she is to problem-solving, the maze of commercial regulations may appear daunting against the mixture of systems and institutions in the Middle East. Fortunately, the guiding force for problem-solving remains the businessman’s sense of expediency and achievement, and the protection which local merchants have imposed on their “agencies,” against both the classical system and the dominant patterns in Europe, are a case in point. That sense to cut through the law in search for solutions, or, what amounts to a close equivalent, profit, is eminently practical. In business, it is universal and overwhelming.

176. Full passage in Cicero, *De Republica*, iii, 22.

177. Conard, *supra* n. 102, at 424.